In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-302

WARREN RANKINS, Superintendent-Principal of the Ducor Union School District, JOAQUIN PARSONS, RICHARD OWEN, JAMES FLYNN, FRANK SILVA, and LAWRENCE SOUTHARD, Members of the Board of Trustees of the Ducor Union School District, and the DUCOR UNION SCHOOL DISTRICT,
Appellants,

vs.

COMMISSION ON PROFESSIONAL COMPETENCE OF THE DUCOR UNION SCHOOL DISTRICT, and the Members thereof, RUDOLF H. MICHAELS, KARYL (CINDI) RUBIN, CLYDE SIMPSON and THOMAS EDWARD BYARS,
Appellees.

On Appeal from the Supreme Court of the State of California

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of California entered on May 30, 1979, reversing the judgment of the Tulare County Superior Court with direction to the Superior Court to deny the petition for writ of administrative mandamus. Appellants submit this Jurisdictional Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented for decision.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of the State of California issued April 30, 1979 is reported at 24 Cal.3d 167, 154 Cal.Rptr. 907, 593 P. 2d 852. (App. F, pp. 1) (Petition for rehearing denied, May 30, 1979). The opinion of the Court of Appeal, Fifth Appellate District, issued November 23, 1977 is reported at 142 Cal.Rptr. 101. (App. E, pp. 1) (Hearing granted by the California Supreme Court January 19, 1978). Neither the memorandum decision of the Tulare County Superior Court dated January 15, 1976 (App. B, pp. 1) nor the written decision of the Commission on Professional Competence (a three person administrative panel hearing and receiving the testimony and evidence) dated August 6, 1975 (App. A, pp. 1) have been reported.

JURISDICTION

This case originated in an administrative proceeding to dismiss Appellee, Thomas E. Byars (hereafter, "Byars"), from his employment as a permanent teacher with Appellants, Ducor Union School District, et al., (hereafter "School District"). (California Education Code of 1959, Section 13403):[1] The Commission of Professional Competence (hereafter "Commission") rendered its decision that Byars not be dismissed as a permanent teacher of the school district on August 6, 1975 by a two to one vote. (The procedure for the hearing process before the Commission

[1]The California Education Code of 1959, which was in effect at the time of the events set forth herein, was replaced by the California Reorganized Education Code of 1976 with extensive amendments and revisions. All references herein are to the 1959 Education Code.

at Education Code Section 13413.) The School District filed a petition for writ of administrative mandamus in the Tulare County Superior Court. (California Code of Civil Procedure, Section 1094.5). The Tulare County Superior Court Judgment setting aside the decision of the Commission and holding that Byars should be dismissed, was entered on April 5, 1976. Byars and the Commission filed a notice of appeal to the Court of Appeal of the State of California, Fifth Appellate District, on May 5, 1976 which issued an unanimous decision on November 23, 1977 affirming the judgment of the Tulare County Superior Court.

Byars' petition for hearing by the California Supreme Court was granted on January 19, 1978. Notwithstanding the School District's contention that the California Supreme Court's interpretation of Article I, Section 8 of the California Constitution was constitutionally invalid in the face of the establishment clause of the First Amendment of the United States Constitution, the California Supreme Court nevertheless reversed the Superior Court judgment by a 4-3 opinion filed April 30, 1979. Appellants' petition for rehearing was denied on May 30, 1979. The Notice of Appeal to the United States Supreme Court was filed July 25, 1979.

The jurisdiction of the United States Supreme Court to review the decision of the California Supreme Court by appeal is conferred by Title 28, United States Code, Section 1257(2). This appeal is being docketed in this Court within 90 days from the denial of rehearing below.

The following decisions sustain the jurisdiction of the United States Supreme Court to review the judgment of the California Supreme Court by appeal in this case:

People ex rel. McCollum v. Board of Education, 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 649, 2 A.L.R.2d 1338; *Hamilton v. Regents of U. of Cal.,* 293 U.S. 245, 55 S.Ct. 197, 79 L.Ed. 343.

QUESTION PRESENTED

DOES A STATE CONSTITUTIONAL REQUIREMENT, AS CONSTRUED BY ITS HIGHEST COURT, THAT A SCHOOL DISTRICT MUST REASONABLY ACCOMMODATE TEACHER ABSENCES FOR UP TO TEN RELIGIOUS HOLIDAYS, OVER AND ABOVE SABBATH DAYS, (ABSENCES WHICH ARE OTHERWISE UNAUTHORIZED AND GROUNDS FOR DISMISSAL) VIOLATE THE ESTABLISHMENT CLAUSE OF THE UNITED STATES CONSTITUTION?

STATUTES INVOLVED

State of California Constitution, Article I, Section 8:

> "A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin."

United States Constitution, First Amendment (in pertinent part):

> "Congress shall make no law respecting an establishment of religion. . . ."

STATEMENT OF THE CASE

Byars was hired by the School District on August 6, 1969 as a classroom teacher and he commenced his duties on September 1, 1969. His contract for the 1969-1970 school year and succeeding school years specified that Byars would "be required to render service in the above mentioned position for such length of time during the school year as the Governing Board of the School District may direct." At the time of his initial job interview, Byars made no mention of his membership in the Worldwide Church of God. In fact, in the 1969-70 and 1970-71 school years, Byars made no requests for leaves of absence to observe the religious holidays with the Worldwide Church of God. It was only in the 1971-72 school year that Mr. Byars began to request leaves of absences for this purpose.

The Worldwide Church of God is a rather small sect having something in excess of 50,000 members throughout the United States. Its doctrines require adherents to observe a "Sabbath" extending from sundown on Friday to sundown on Saturday and religious holidays occurring throughout the year, namely, 1) First and Last Day of Unleavened Bread, 2) Day of Pentecost, 3) Feast of Trumpets, 4) Day of Atonement, 5) and an eight-day observance in the fall called the Feast of Tabernacles and Last Great Day.

The School District accommodated Byars as far as Friday evening school activities were concerned and for two religious holidays in the 1971-1972 school year and the 1972-1973 school year.

Mr. Byars, having made written requests for religious leaves of absence and having been refused by the District Board of Trustees, left his employment without the permission or authorization of the District Superintendent or the Ducor Union School District Board of Trustees on the following dates:

1971-1972 *School Year:*

October 4, 1971, October 5, 1971, October 6, 1971, October 7, 1971, October 8, 1971, October 11, 1971, April 5, 1972, and May 22, 1972;

1972-1973 *School Year:*

September 26, 1972, September 27, 1972, September 28, 1972, September 29, 1972 and April 23, 1973;

1973-1974 *School Year:*

September 27, 1973, October 10, 1973, October 11, 1973, October 12, 1973, October 15, 1973, October 16, 1973, October 17, 1973, October 18, 1973;

1974-1975 *School Year:*

September 17, 1974, September 26, 1974, September 30, 1974, October 1, 1974, October 2, 1974, October 3, 1974, October 4, 1974, October 7, 1974, October 8, 1974 and April 2 1975.

To cover these absences, the School District hired seven different substitute teachers over the span of the four schools years to replace Byars during these unauthorized absences.

The School District then commenced a proceeding for the dismissal of Byars by filing an accusation alleging persistent refusal to obey the reasonable rules and regulations of the School District and the laws and statutes of the State of California pursuant to Education Code Section 13403(g). A hearing was held before the appellee Commission on Professional Competence on July 24, 1975.

APPELLANTS RAISED THE ESTABLISHMENT CLAUSE ISSUE IN EACH AND EVERY TRIBUNAL CONSIDERING THE CASE

After the presentation of the evidence before the Commission on Professional Competence, counsel for the School District contended that the Board of Trustees of the School District would necessarily violate the Establishment Clause of the United States Constitution if it were to permit Byars to be absent for up to ten days for religious observances. (Administrative Hearing Transcript 103:15-105:2.)[2] The Commission on Professional Competence did not rule on the Establishment Clause issue.

In the Petition for Writ of Administrative Mandamus filed in the Tulare County Superior Court on September 3, 1975 to review the decision of the Commission on Professional Competence, the School District alleged as follows:

> "(9) Respondents' decision is not in conformance with the law in that Respondents failed to find and ultimately decide that, if the Petitioners had granted Byars' request by granting him leaves of absence from his employment to observe holy days according to the

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[2]Administrative Hearing Transcript at 103:15, Mr. Bowman, Counsel for the District stated:

> "But, there is another, the other side of the coin. The Constitution also says that Congress shall make no law respecting the establishment of religion. And that means—establishment means—the Congress, the State, the school district shall make no rule or regulation which will prefer or favor one religion over the other."

and at 104:10:

> "We have the same thing here. We have Mr. Byars coming into Ducor Union School District and asking this district to make a rule that Mr. Byars be discharged from his contractual duties of rendering service for as many as ten days a year."

doctrines of the World Wide Church of God, Petitioners would be in violation of the establishment of religion clause of the First Amendment of the United States Constitution."

(Clerk's Transcript: Petition for writ of Administrative Mandamus: 6-3-11) The Establishment Clause issue was briefed in the School District's points and authorities submitted to the Superior Court in support of the Petition for Administrative Mandamus. The Superior Court judge did not reach the establishment clause issue inasmuch as it ruled the School District did not violate Byars' constitutional right to freely exercise his religion.

The School District likewise briefed the establishment clause issue in its Respondents' brief in the California Court of Appeal, Fifth Appellate District, after Byars had appealed to that Court from the judgment of the Superior Court. The California Court of Appeal, like the Tulare County Superior Court, did not reach the establishment clause issue affirming the Superior Court's judgment that the School District had not violated Byars' right of free exercise of religion.[3]

[3]The School District in its Respondents brief filed May 19, 1977 in the Court of Appeal noted the current developments in the United States Supreme Court as follows:

III

"CUMMINS v. PARKER SEAL AND HARDISON v. TWA"

The Court will perhaps recall the recent case of *Cummins v. Parker Seal*, 45 L.W. 4009, in which the judgment was affirmed by an equally divided Court with Stevens, J. not participating, on November 2, 1976. The question there was whether the discharge of a World Wide Church of God member refusing Saturday work violated Title VII guidelines forbidding religious discrimination. The employer in that case also contended that both the enabling statute and the guidelines were unconstitutional as violating the Establishment Clause.

Just after the announcement of the tie vote, or on November 16, 1976 the United States Supreme Court granted certiorari in *Hardison v. TWA*, 45 L.W. 3363. This case has the identical issues as found in the *Cummins v. Parker Seal* case. This case was orally argued on March 30, 1977 and the written opinion is expected before the June adjournment. Respondents do not believe the case will have a bearing on the Free Exercise question in this case, but may well be decisive on the Establishment Clause question. Respondents, therefore, respectfully request permission to file a supplementary brief analyzing that case when it is handed down."

The United States Supreme Court, of course, did not reach the Establishment Clause issue in *Hardison v. T.W.A.*, 432 U.S. 63, 53 L.Ed2d 113, 97 S.Ct. 2264 making further briefing unnecessary. for the California Court of Appeal.

The quotation underscores the substantiality of the question in this appeal in light of the 4-3 decision rendered by California Supreme Court on the establishment clause in this case.

After Byars' petition for hearing was granted by the California Supreme Court on January 19, 1978, that Court, in a letter to counsel dated March 7, 1978 invited additional briefing on these two points:

"1. What appears to be the relevance of Article I, Section 8 of the California Constitution?

2. Has Ducor Unified School District satisfied the requirements of the Civil Rights Act of 1964? (See particularly 42 U.S.C. Sec. 2000e(j))"

The School District responded in a Supplemental Brief filed April 4, 1978 that application of these sections would violate the Establishment Clause of the First Amendment of the United States Constitution. The Establishment Clause issue was orally argued at considerable length before the Supreme Court on May 4, 1978.

Against the School District's contention that Article I, Section 8 of the California Constitution was repugnant to the Establishment Clause of the First Amendment, the Supreme Court expressly decided in favor of its validity. (App. pp. F-12).

A SUBSTANTIAL FEDERAL CONSTITUTION QUESTION IS PRESENTED

The California Supreme Court in deciding the *Rankins* case engrafts Sections 701(j) and 703(a)(1) of the Federal Civil Rights Act of 1964 (42 U.S.C. Sec. 2000e(j) and 42 U.S.C. Sec. 2000e-2(a)(1)) onto the language of Article I, Section 8 of the California Constitution. Thus, "disqualification" and "creed" under the California statute became tantamount to "discrimination" and "religion" respectively under the Federal Statute. The California Supreme Court goes further and uses the guidelines issued by the Equal Employment Opportunities Commission to define the School District's duty as an employer to include an obligation to make reasonable accommodations to employees' religious needs insofar as possible without undue hardship on the employer. 29 CFR 1605.1(b), 42 U.S.C. Sec. 2000e(j). Under the California Supreme Court ruling the School District must accommodate Byars not only from sunset Friday night to sunset Saturday night but also for as many as ten religious holidays during a school year. Byars is thus relieved of contractual and statutory obligations to the School District to perform teaching duties by claiming this religious exemption.

The immediate effect of the California Supreme Court ruling is to require a governmental entity, a school district, to give a preference to a particular, identifiable religion, namely, to the Worldwide Church of God which seeks and receives unprecedented prerogatives to practice its religion. It also requires the School District to 1) entertain teacher requests for leaves of absence; 2) determine whether the applicant is adherent of a bona fide "religion" or "creed"; 3) determine the religious sincerity of the

applicant for a leave of absence, rejecting those of a frivolous or fraudulent nature.

A novel and substantial issue respecting the application of the establishment clause is thus presented for decision and resolution by the United States Supreme Court.[4]

The four man majority of the California Supreme Court acknowledges that issue presented in this case is an open question as far as the United States Supreme Court is concerned. The Court in *Rankins v. Commission on Professional Competence,* 24 Cal.3d 167, at 177, 154 Cal.Rptr. 907, at 913, 593 P.2d 852, at 858 stated:

> "The validity under the establishment clause of the imposition on employers by the Civil Rights Act of 1964 of a duty of reasonable accommodation to employees' religious practices (42 U.S.C. Sec. 2000e(j)) has not been directly decided by the United States Supreme Court."

The petitioner *Trans World Airlines, Inc.* raised the Establishment Clause issue in its briefs in *Trans World Airlines v. Hardison,* 432 U.S. 63, 53 L.Ed.2d 113, 97 S.Ct.

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[4]See the comment of Circuit Judge Bell in *Catholic Bishop of Chicago v. N.L.R.B.* (1977 7th CA) 559 F.2d 1112; judgment affirmed (1979) .. U.S. .., 99 S.Ct. 1313, 59 L.Ed.2d 533 where, after reviewing the meaning of "accommodation" in religious discrimination cases, stated: "This synopsis of recent litigation in the religion area persuades us that at the very least there is a substantial constitutional question where what is involved is an "accommodation" or synonymously, an adjustment or an adaptation or a compromise and settlement involving a First Amendment right." (Emphasis supplied) Cited by District Judge Cohill with approval in *Gavin v. Peoples Natural Gas Company,* (W.D. Penn. 1979) 464 F.Supp. 622 who, in holding the "reasonable accommodation" provision violated the establishment clause, stated:

> "These larger questions are more appropriate concerns for appellate courts, and we would invite their review."

2264, dealing with employee refusal to work on Saturdays as a member of the Worldwide Church of God. It was unnecessary for the Court to reach the question in that case, holding as it did, that accommodation of Hardison would constitute an undue hardship on the employer. See also *Cummins v. Parker Seal Co.*, (6th Cir. 1975), 516 F.2d 544, aff'd by an equally divided court, 429 U.S. 65, 50 L.Ed.2d 223, 97 S.Ct. 342, Rehearing granted and remanded, 433 U.S. 903, 53 L.Ed.2d 1087, 97 S.Ct. 2965 and *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (1970), again affirmed by an equally divided court, 402 U.S. 689, 29 L.Ed. 2d 267, 91 S.Ct. 2186 (1971).[5] The Hardison case has had a universal influence on state courts deciding similar issues. The failure to decide the establishment clause issue has resulted in considerable confusion in those courts. (See cases cited in footnotes 6 and 7).

Recognizing that today the United States of America is a pluralistic and largely secularized society, (See *McGowan v. Maryland* (1961) 366 U.S. 420, 6 L.Ed.2d 393, 81 S.Ct. 1101, *Two Guys v. McGinley* (1961) 366 U.S. 582, 6 L.Ed.

[5]The majority of the Court of Appeals panel in *Cummins* found no violation of the establishment clause by the religious accommodation provision *as applied to a private employer*. A strong dissent by Celebrezze, Circuit Judge held Regulation 1605.1 and 42 U.S.C. 2000e(j) to be a patent violation of the establishment clause.

The majority of the panel in *Dewey* did not reach the establishment clause issue, but in the opinion accompanying the order denying a petition for rehearing. Circuit Judge Weick stated:

> "To construe the [Civil Rights] Act as authorizing the adoption of Regulations which could coerce or compel an employer to accede to or accommodate the religious beliefs of all his employees would raise grave constitutional questions of the violation of the Establishment Clause of the First Amendment. It is settled that the Government, in its regulations with religious believers and nonbelievers must be neutral. The Government is without power to support, assist, favor or handicap any religion. (Citations omitted.)"

2d 551, 81 S.Ct. 1135, *Gallagher v. Crown Kosher Super Market* (1961) 366 U.S. 617, 6 L.Ed.2d 536, 81 S.Ct. 1122), it is more important than ever to maintain the wall of separation between church and State. *Everson v. Board of Education* (1947) 330 U.S. 1, 91 L.Ed. 711, 67 S.Ct. 504, 168 A.L.R. 1392. Article I, Section 8 of the California Constitution as interpreted by the California (in effect incorporating 42 U.S.C. Sec. 2000e-2(a)(1)) and EEOC guidelines as a gloss on the statute) requiring a school district to release a teacher for up to ten working days for religious holidays represents a serious breach of that wall.[6] The issue is ripe for decision and resolution by this Court.[7]

[6]The United States District Court cases have held that 42 U.S.C. 2000e(j) violates the First Amendment Establishment Clause, Viz., *Yott v. North American Rockwell Corp.*, 428 F.Supp. 763 (C.D.Cal. 1977); *Gavin v. Peoples Natural Gas Company*, 464 F.Supp.622 (W.D. Penn.). The Establishment Clause issue is pending in another U.S. District Court. *Anderson v. General Dynamics Convair, etc.*, 589 F.2d 397 (9 Cir. 1978), Cert. denied, June 4, 1979, Brennan J., White, J. for granting cert. The constitutionality of "reasonable accommodation" under Title VII and EEOC guidelines as applied to Seventh Day Adventist refusing to join a union expressly left open by the 9th Circuit. Reversed and remanded to the U.S. District Court. The matter has been retried in District Court and submitted for decision on the establishment clause issue. The Establishment Clause issue is also presently pending in the 9th Circuit in the *Yott v. North American Rockwell Corporation* case (cited supra) case number 78-1790. Argued and submitted to the U.S. Court of Appeals, 9th Circuit, May 2, 1979. Two Circuit Court of Appeals cases have found violation of the Establishment Clause in vigorous dissenting opinions (see footnote 5). See also the dissent in *Rankins v. Commission on Professional Competence*, 24 Cal.3d 167 at 178, 154 Cal.Rptr. 907 at 914, 593 P.2d 852 at 859.

[7]The cases in the fair employment practice field involving the Worldwide Church of God and other sects are legion. The magnitude of the issue is illustrated by these state and federal cases: *Hildebrand v. Unemployment Ins. Appeals Bd.* (1977) 19 Cal.3d 765, 140 Cal.Rptr. 151, 566 P.2d 1297; *Blakely v. Chrysler Corp.*, 407 F.Supp. 1227 (U.S.D.C., E. Dist. 1975); *Brown v. General Motors Corp.* (CA 8th 1979) 48 L.W.2036; *Huston v. Auto Workers, Local 93* (CA 8th 1977) 559 F.2d 477; *Umberfield v. School*

CONCLUSION

It is respectfully submitted that the Supreme Court has jurisdiction of this Appeal.

Dated: August 24, 1979

Respectfully submitted,

CALVIN E. BALDWIN
County Counsel
By THOMAS D. BOWMAN
Assistant County Counsel
Attorneys for Appellants

(Appendices Follow)

District No. 11, 512 P.2d 1166 (Colo. 1974) (Refusal to accommodate School Teachers request for leaves of absence to observe Worldwide Church of God holidays held not to be a discriminatory or unfair employment practice); reversed on other grounds, 522 P.2d 730; *Wondzell v. Alaska Wood Products* (Alaska 1978) 583 P.2d 860; *Chrysler v. Mann,* 561 F.2d 1282 (8 Cir. 1977) (Company did not discriminate against member of Worldwide Church of God who took unpaid leaves of absence to observe Friday-Saturday Sabbath); *United States v. City of Albuquerque,* 545 F.2d 110 (10 Cir. 1976); *Draper v. United States Pipe and Foundry Co.,* 527 F.2d 515 (6 Cir. 1976). (Member of Worldwide Church of God discharged for refusing to work Saturdays, held, employer must accommodate this employee's religious practice even though other workers would be inconvenienced in covering for him); *Reid v. Memphis Publishing Co.,* 369 F.Supp. 684 (W.D. Tenn., 1973), aff'd 521 F.2d 512 (6th Cir. 1974) reh. denied 525 F.2d 986 (6 Cir. 1975), Cert. denied, 429 U.S. 964, 97 S.Ct. 394, 50 L.Ed.2d 333 (1976) (copy reader who was Seventh Day Adventist teacher denied employment because of refusal to work Saturdays awarded damages); *Johnson v. U.S. Postal Service,* 364 F.Supp. 37 (N.D. Fla. 1973) (Postal clerk who was a member of the Worldwide Church of God refusing to work Saturdays was not entitled to reasonable accommodation of religious schedule; Middlebrooks, J. noted the establishment clause issue in passim, affirmed 497 F.2d 130 (5 Cir. 1974); *Ward v. Allegheny Ludlum Steel Corp.* 560 F.2d 579 (3 Cir. 1977)—(remand to District Court in light of

Hardison v. TWA; issue of the constitutionality of reasonable accommodation provision expressly left open). *Redmond v. Gaf Corp.,* 574 F.2d 897 (7 Cir. 1978) (Employer required to accommodate Jehovah Witness employee's participation in Saturday Bible class); *Shaffield v. Northrop Worldwide Aircraft Services, Inc.,* 373 F.Supp. 937 (S.D. Ala. 1974) (Employer had failed to reasonably accommodate Seventh Day Adventist refusing to work from sunset Friday to sunset Saturday); *Weitkenaut v. Goodyear Tire and Rubber Co.,* 381 F.Supp. 1284 (D. Vermont 1974) (Employer accommodating Sabbath practices of employees regardless of the day of the week held to have failed to reasonably accommodate minister of New Apostolic Church who required one Friday a month for ministerial duties); *King's Garden, Inc. v. Federal Communications Comm.,* 498 F.2d 51, 7 FEP 1083 (D.C. Cir. 1974) Cert. denied 419 U.S. 996 (42 U.S.C.A. 2000e-1 exempting religious institutions held to violate the establishment clause). Cases and administrative decisions illustrating the conflict of Title VII and the Establishment Clause when attempting to ascertain the meaning of "religion" in employment discrimination cases: EEOC Decision No. 71-779 (1970), "Old Catholic"; EEOC Decision No. 71-2620 (1971), "Black Muslim"; EEOC Decision No. 72-1301 (1972), believer in contents of a book entitled "Birth of Human Being"; but see *Bellamy v. Mason's Stores, Inc.* 368 F.Supp. 1025, (D.C.Va. 1973) "Ku Klux Klan" not a religion. *Maine Human Rights Commission v. Local 1361,* etc., (1978 Me.) 383 A.2d 369, (Employer must accommodate Seventh Day Adventist employee refusing to pay union dues for religious reasons. Remanded to take further evidence on undue hardship to union.); *Olin Corp. v. Fair Employment Practices Commission,* (1977 Ill.) 367 N.E.2d 1267, 67 Ill.2d 466, 10 Ill. Dec. 501; (Duty of employer to accommodate Seventh Day Adventist employee's Saturday religious observances); *Kentucky Commission v. Commonwealth of Kentucky.* (1978 Ky. App.) 564 S.W.2d 38 (State employer required to accommodate nurse employee who, as a member of the Worldwide Church of God, abstained from employment from sunset Friday to sunset Saturday and seven holy days of the church.)

Appendices

APPENDIX A

Before the Commission on Professional Competence
of the Ducor Union School District

No. OAH N-6653

In the Matter of the Dismissal of
Thomas Edward Byars
Respondent.

DECISION

This matter came on regularly for hearing on July 24, 1975 in Ducor, California, before a Commission on Professional Competence composed of Mrs. Cindi Rubin, selected by the respondent, Mr. Clyde Simpson, selected by the Ducor Union School District, and Rudolf H. Michaels, Hearing Officer, Office of Administrative Hearings, Chairman.

The Superintendent of the Ducor Union School District was represented by Thomas D. Bowman, Assistant County Counsel of Tulare County, California.

The respondent was present and was represented by Paul Busacca, his attorney.

Oral and documentary evidence was received, the record was closed and the matter was submitted.

The Commission makes the following decision:

FINDINGS OF FACT

I

Warren Rankins (hereafter referred to as the "Superintendent") made the Accusation in his official capacity of Superintendent of the Ducor Union School District (hereafter referred to as the "District").

II

At all times material herein, the respondent was employed as a certificated employee, and he is now a permanent certificated employee of the District.

III

On May 12, 1975, the Superintendent filed a Statement of Charges against respondent with the Board of Trustees of the District (hereafter referred to as the "Board").

IV

On May 12, 1975, the Board resolved to give respondent Notice of Intention to Dismiss.

V

On May 13, 1975, respondent was personally served with the Notice of Intention, a Statement of Charges and a copy of the applicable provisions of the Education Code (hereafter referred to as the "Code").

VI

On May 28, 1975, respondent requested a hearing.

VII

On the dates shown below, respondent was absent from his employment as a classroom teacher of the District without authorization, having, in each instance, applied for

leave of absence and having been denied such leave by the Board or the Superintendent or both:

School Year	Dates of Absence
1971-1972	October 4, 5, 6, 7, 8 and 11, 1971, April 5, 1972 and May 22, 1972.
1972-1973	September 26, 27, 28 and 29, 1972 and April 23, 1973.
1973-1974	October 11, 12, 15, 16, 17 and 18, 1973.
1974-1975	September 30, October 1, 2, 3, 4, 7 and 8, 1974 and April 2, 1975.

VIII

Each of the days specified in Finding VII was observed by the Worldwide Church of God as a High Holy Day. The principles on which the church is founded include strict observance of the sabbath and the Holy Days by abstention from "regular work". Failure to attend services on these days, or otherwise to observe the tenets of the church may result in exclusion of the member from the church and its faith. The Worldwide Church of God has in excess of 50,000 members throughout the United States, maintains a substantial college in Pasadena, California, for the purpose of educating its ministers, publishes numerous pamphlets and periodicals, and broadcasts radio and television programs through more than two hundred outlets in the United States and Canada.

IX

Respondent was not a member of this faith when he became employed by the District in 1969. He was converted and baptized during the first part of 1971 and has been, and now is, a practicing member of the Worldwide Church of God. On each of the occasions noted in Finding VII, he applied for leave of absence well in advance, stated that he

needed the leave in order to observe the High Holy Days of his faith, and supplied evidence that the days in question were indeed such holy days. On each occasion, his request for leave of absence was denied. Under a District policy adopted on October 18, 1971, requests for leave of absence of more than two consecutive days must be addressed to the Board. Respondent complied with this requirement whenever it was applicable.

X

In March, 1973, the Board advised respondent, then still a probationary certificated employee, by letter that it strongly disapproved of his taking unauthorized leave; that it had considered not reemploying him but had received legal advice that respondent's conduct did not then amount to a "persistent" refusal to comply with the reasonable rules of the District, so that termination of respondent's employment as a probationary employee on those grounds would be of dubious legality; that he would therefore be reemployed for the 1973-1974 school year thereby achieving permanent status; that a continuation of his practice would be regarded as a persistent failure to abide by the rules of the District and as cause for dismissal; and that the letter itself also constituted a reprimand.

XI

Despite the denial of his various requests and the receipt of the letter described in Finding X, respondent failed to appear for duty on the days listed in Finding VII.

XII

On each occasion, respondent furnished ample notice to the school authorities that he was going to be absent. He

prepared careful lesson plans and thorough instructions for use by a substitute teacher. The school was always able to obtain a substitute. Except on September 27, 1972, the same substitute took over respondent's duties for the entire period of each of his prolonged absences.

XIII

None of respondent's absences had a substantial detrimental effect on the educational program of the school.

XIV

The policy of the Board requiring that application for leave of absence for more than two consecutive days be made to the Board was reasonable as such and was observed by respondent, but this finding is made solely with respect to the reasonableness of the policy itself and is not intended to, nor does it, constitute a finding on whether or not the Board exercised its authority under this policy in a lawful or constitutional manner.

XV

The actions of the Superintendent and the Board denying respondent's requests for leave of absence to enable him to comply with the requirements of his faith, reprimanding him and threatening him with dismissal if he persisted in failing to report for duty on the Holy Days observed by the Worldwide Church of God interfered with, and had a chilling effect on, his free exercise of his religion.

DETERMINATION OF ISSUES

I

Under the circumstances of this case and the facts found above, the actions of the Superintendent and the Board

denying respondent's requests for leave of absence to enable him to comply with the requirements of his faith were unlawful in that each of these denials was in violation of the provisions of Amendments I and XIV to the Constitution of the United States and Section 4 of Article I of the Constitution of the State of California.

II

Respondent's conduct in failing to perform his duties as a certificated employee of the District on the dates shown in Finding VII was not in violation of a lawful order and therefore does not constitute a persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him.

III

Cause was not established for the dismissal of respondent from his position as a permanent certificated employee of the District under the provisions of Section 13403(g) of the Code.

ORDER

1. Respondent Thomas Edward Byars shall not be dismissed from his position as a permanent certificated employee of the Ducor Union School District.

2. This decision shall become effective forthwith.

Dated: August 6, 1975.

/s/ Karyl (Cindi) Rubin
Cindi Rubin, Member

/s/ Rudolf H. Michaels
Rudolf H. Michaels, Chairman

I dissent.

I concur in Findings of Fact I through XII and XIV but I find that respondent's conduct had a substantial detrimental effect on the educational program of the school and that similar future conduct will continue to have such a detrimental effect.

I further find that respondent was bound by his contracts to perform his duties as a certificated employee of the District unless he was granted leave of absence; that, having chosen to enter into annual contracts with the District, particularly following the advice and the reprimand contained in the letter described in Finding X, he had the choice of either remaining employed by the District and complying with its rules and the orders of those in lawful authority or of finding employment compatible with the requirements of his faith. I therefore find that the Board was within its legal and constitutional rights to deny him leave and conclude that his continuing failure to comply with the Board's orders constitutes a persistent violation of and refusal to obey the school laws of the state and the reasonable regulations prescribed for the government of the public schools by the District and cause exists for his dismissal under Section 13403(g) of the Code.

I would therefore make an order that respondent be dismissed.

/s/ Clyde Simpson
Clyde Simpson, Member

Dated: August 6, 1975.

APPENDIX B

Superior Court of the State of California for the County of Tulare

No. 80493

Warren Rankins, Superintendent-Principal of the Ducor Union School District, Joaquin Parsons, Richard Owen, James Flynn, Frank Silva, and Lawrence Southard, Members of the Board of Trustees of the Ducor Union School District, and the Ducor Union School District,

Petitioners,

vs.

Commission on Professional Competence of the Ducor Union School District, and the Members thereof, Rudolf H. Michaels, Karyl (Cindi) Rubin and Clyde Simpson,

Respondents,

Thomas Edward Byars,

Real Party in Interest.

[Filed Jan. 15, 1976]

MEMORANDUM DECISION

Petitioners' motion to file the amended accusation is herewith granted as allowed by Government Code Section 11507 and *Karbach v. Board of Education,* 39 Cal.App.3d 355.

The controlling case under the facts presented in the case at bench is the case of *Stimpel v. State Personnel Board,* 6 Cal.App.3d 206. The facts are very similar in that both Stimpel and the Respondent herein, Mr. Byars, refused to work on their religious days and it was, therefore, necessary that the government employer find substitute employees to fulfill their employment contractual obligations.

Respondents herein, as in the *Stimpel* case, place great reliance on the case of *Sherbert v. Verner,* 374 U.S. 398. However, Justice Gustafson speaking for the Court in the *Stimpel* case rejected this reliance and held the cases distinguishable on the facts. At page 209 the Court stated:

> "There the employee could receive unemployment compensation benefits only from the state. There were no alternative sources. Here the Department of Water Resources of the state is not the only source of employment of Stimpel as a construction inspector."

Also, in the instant case there would certainly be other types of employment available to Mr. Byars where he would not be required to work on his religious days. Also, there may be private educational institutions which may accommodate respondent Byars regarding his religious practices.

Justice Gustafson went on to state the basis for the holding as follows:

> "The proliferation of religions with an infinite variety of tenets would, if the state is required as an employer to accommodate each employee's particular scruples, place an intolerable burden upon the state. We conclude that if a person has religious scruples which conflict with the requirements of a particular job with the state, he should not accept employment or, having accepted, he should not be heard to complain if he is discharged for failing to fulfill his duties."

In the instant case the petitioner has already substantially attempted to accommodate the respondent Byars by not requiring that he participate in school activities on Friday evenings, as is required of other certificated personnel, since this conflicted with one of his religious tenets requiring that he not participate in secular activities between sundown on Friday and sundown on Saturday.

Respondent also relies on the case of *Montgomery v. Board of Retirement,* 33 Cal.App.3d 447. Here the Fifth District Court of Appeal, speaking through Justice Brown, held that a county employee was entitled to a nonservice-connected disability retirement even though the condition causing incapacity was correctable by a non-hazardous operation, where the employee's religious beliefs did not permit such surgery, which would force the employee to abandon the precepts of her religion or forfeit the benefits, thus substantially infringing upon her First Amendment right to the free exercise of her religion, where there was no showing of any substantial threat to any compelling state interest.

The Court at page 451 noted the two-pronged analysis required under the *Sherbert* case. "First, whether the application of the statute imposes any burden upon the free exercise of the defendant's religion, and second, if it does, whether some compelling state interest justifies the infringement." The Court went on to conclude that the three compelling interests asserted by the Board of Retirement

in that particular case, to wit: (1) The preservation of the life and health of citizens; (2) the preservation of an active and capable and productive county work force; and (3) the preservation of the financial integrity of the fund did not meet the criteria of "compelling state interest."

However, in the case at bar, Mr. Warren Rankins, Superintendent of the Ducor Union School District, testified that, in his opinion, based on his long experience as a professional educator and administrator, a substitute teacher cannot adequately replace the regular teacher. He further testified as to the need for a period of time for a teacher to get orientated to the children in the classroom and discipline problems that arise under a substitute teacher and the lack of student progress under a substitute teacher.

This testimony clearly demonstrates that the School District does have a compelling interest in keeping absences of regular teachers to a minimum so as not to unduly interrupt the orderly educational progress of its students.

The Court therefore finds as follows:

(1) That the Ducor Union School District has no duty to grant leaves of absence to the real party in interest, Mr. Byars, from his teaching duties, imposed by contract and statute, for religious observances.

(2) That the absences of the real party in interest had a substantial detrimental effect on the educational program of the school.

(3) That the Ducor Union School District had a compelling interest to keep the absences of regular permanent teachers on its staff to a minimum and was therefore justified in refusing to grant the real party in interest, Mr. Byars, leave of absences for religious observances.

(4) That the real party in interest may not interpose nor offer the privilege of free exercise of religion under the United States and California Constitutions as an excuse or authority for his absences from his teaching duties with the Ducor Union School District.

(5) Under the circumstances of this case and the facts found above, the actions of the Superintendent and the Board denying real party in interest's requests for leave of absence for religious observances were lawful and did not violate the provisions of Amendment I and XIV to the Constitution of the United States and Section 4 of Article I of the Constitution of the State of California.

(6) Respondent's conduct in failing to perform his duties as a certificated employee of the District on the dates set forth in the amended accusation was in violation of a lawful order and the reasonable rules and regulations of the Ducor Union School District and the school laws of the State of California and therefore constitutes a persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him.

(7) Cause was established for the dismissal of real party in interest from his position as a permanent certificated employee of the District under the provisions of Section 13403(g) of the Education Code.

IT IS HEREWITH ORDERED AND ADJUDGED that the respondent, Thomas Edward Byars, shall be dismissed as a permanent certificated employee of the Ducor Union School District forthwith.

If Findings of Fact and Conclusions of Law are requested, then counsel for the petitioners is ordered to prepare the same in accordance herewith.

Dated: January 14, 1976.

/s/ Jay R. Ballantyne
Judge of the Superior Court

APPENDIX C

Superior Court of the State of California for the County of Tulare

Superior Court No. 80493

Warren Rankins, Superintendent-Principal of the Ducor Union School District, Joaquin Parsons, Richard Owen, James Flynn, Frank Silva, and Lawrence Southard, Members of the Board of Trustees of the Ducor Union School District, and the Ducor Union School District,

Petitioners,

vs.

Commission on Professional Competence of the Ducor Union School District, and the Members thereof, Rudolf H. Michaels, Karyl (Cindi) Rubin and Clyde Simpson,

Respondents,

Thomas Edward Byars,

Real Party In Interest.

[Filed Apr. 5, 1976]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came regularly before this Court on November 26, 1975, for hearing. Thomas D. Bowman, Assistant County Counsel, appeared as attorney for Petitioners, William J. Power, Deputy Attorney General, appeared as attorney for Respondent, and Paul Busacca, appeared

as attorney for the Real Party in Interest. The record of the administrative proceedings having been received into evidence and examined by the Court, the motion by the Petitioners to produce additional evidence having been heard and denied, no additional evidence having been received, arguments having been presented, and the matter having been submitted for decision after exercise of the Court's independent judgments, the Court makes the following:

FINDINGS OF FACT

1. Petitioner, Ducor Union School District, located in Tulare County, State of California, is an elementary school district organized and administered under the Education Code of the State of California, providing education and educational facilities to children residing within the boundaries of the District in classes, Kindergarten through Seventh Grade.

2. Petitioners, Joaquin Parsons, Richard Owen, James Flynn, Frank Silva and Lawrence Southard are members of Ducor Union School District Board of Trustees charged with controlling and administering the affairs of the Ducor Union School District.

3. Petitioner, Warren Rankins, at all times material herein, was the Superintendent-Principal of the Ducor Union School District.

4. Respondents are the Commission on Professional Competence of the Ducor Union School District, and three members thereof, Rudolf H. Michaels, Karyl (Cindi) Rubin and Clyde Simpson, and was the body constituted pursuant to Education Code section 13413 to hear and weigh evi-

dence in the accusation against the Real Party in Interest, Thomas E. Byars.

5. Real Party in Interest, Thomas E. Byars, at all times material herein, was, and is now employed as a permanent certificated employee of the Ducor Union School District and has, for each year of his employment, contracted to render service as a classroom teacher for such length of time as the Board of Trustees may direct.

6. On May 12, 1975, the Superintendent filed a Statement of Charges against Respondent with the Board of Trustees of the District (hereafter referred to as the "Board").

7. On May 12, 1975, said Board unanimously resolved to give the Real Party in Interest, Thomas E. Byars, Notice of Intention to Dismiss on the Grounds of persistent violation of and refusal to obey the school laws of the State and/or the reasonable regulations of the Ducor Union School District pursuant to Education Code section 13403(g).

8. On May 13, 1975, the Real Party in Interest was personally served with the Notice of Intention, a Statement of Charges and a copy of the applicable provisions of the Education Code.

9. On May 28, 1975, Real Party in Interest requested a hearing.

10. On June 5, 1975, an Accusation was filed with the Petitioners charging the Real Party in Interest with persistent violation and refusal to obey the school laws of the State and/or the reasonable rules and regulations of

the Ducor Union School District. The Real Party in Interest filed his Notice of Defense on June 10, 1975. On June 27, 1975 an amended Accusation was filed with Petitioners. The amendment to Accusation, adding additional school days that the Real Party in Interest was absent without leave or excuse was refused by Respondents.

11. On July 24, 1975, Respondents conducted an administrative hearing at the Ducor Elementary School, Ducor, California.

12. On August 6, 1975, Respondents rendered their written decision with an order appended thereto that Real Party in Interest "Shall not be dismissed from his position as a permanent certificated employee of the Ducor Union School District." (Karyl (Cindi) Ruben, Rudolf H. Michaels, Chairman, for the majority; Clyde Simpson, dissenting.) A copy of said written decision is attached hereto as Exhibit "A" and incorporated herein as though set forth in full.

13. On the dates shown below, Real Party in Interest was absent from his employment as a classroom teacher of the District without authorization, having, in each instance, applied for leave of absence and having been denied such leave by the Board or the Superintendent or both:

School Year	Dates of Absence
1971-1972	October 4, 5, 6, 7, 8 and 11, 1971, April 5, 1972 and May 22, 1972.
1972-1973	September 26, 27, 28 and 29, 1972 and April 23, 1973.
1973-1974	September 27, October 10, 11, 12, 15, 16, 17 and 18, 1973.
1974-1975	September 17, 26, 30, October 1, 2, 3, 4, 7 and 8, 1974 and April 2, 1975.

14. The Worldwide Church of God is an organized religious sect which has in excess of 50,000 members throughout the United States. The Worldwide Church of God observes each of the days specified in Finding 13 as a Holy Day. The principles on which the church is founded include strict observance of the "sabbath" and the "Holy Days" by abstention from "regular work." The "sabbath" as observed by the Worldwide Church of God extends from sundown on Friday to sundown on Saturday.

15. Real Party in Interest was not a member of this faith when he became employed by the District in 1969. He was converted and baptized during the first part of 1971 and has been, and now is, a practicing member of the Worldwide Church of God.

16. Petitioners have accommodated the religious beliefs of Real Party in Interest insofar as they have excused Real Party in Interest from participation in school activities, which are required of other teachers, from sundown on Friday to sundown on Saturday, the "sabbath" observed by the Worldwide Church of God.

17. On each of the occasions set forth in Finding 13, Real Party in Interest applied for leave of absence well in advance, stated that he needed the leave in order to observe the High Holy Days of his faith, and supplied evidence that the days in question were holy days. On each occasion, his request for leave of absence was denied except for two days in each of the 1971-1972 and 1972-1973 school years. Under a District policy adopted on October 18, 1971, requests for leave of absence of more than two consecutive

days must be addressed to the Board. Real Party in Interest complied with this requirement whenever it was applicable.

18. On each of the occasions noted in Finding 13, Petitioners required to hire substitute teachers to replace Real Party in Interest in classroom as follows:

1971-72	
10/ 4/71	Beverly Parker
10/ 5/71	Beverly Parker
10/ 6/71	Beverly Parker
10/ 7/71	Beverly Parker
10/ 8/71	Ione Day
4/ 5/72	Pauline Durbin
5/22/72	Betty Golden
1972-73	
9/26/72	Ione Day
9/27/72	Betty Golden
9/28/72	Ione Day
9/29/72	Ione Day
4/23/73	Ione Day
1973-74	
9/27/73	Linda Zimmerman
10/10/73	Linda Zimmerman
10/11/73	Linda Zimmerman
10/12/73	Linda Zimmerman
10/15/73	Linda Zimmerman
10/16/73	Linda Zimmerman
10/17/73	Linda Zimmerman
10/18/73	Linda Zimmerman
1974-75	
9/17/74	Linda Zimmerman
9/26/74	Linda Zimmerman
9/30/74	Linda Zimmerman
10/ 1/74	Linda Zimmerman
10/ 2/74	Linda Zimmerman
10/ 3/74	Linda Zimmerman
10/ 4/74	Linda Zimmerman
10/ 7/74	Linda Zimmerman
10/ 8/74	Ronald Miller
4/ 2/75	Barbara Carter

19. In March, 1973, the Board advised Real Party in Interest, then still a probationary certificated employee, by letter that it strongly disapproved of his taking unauthorized leave; that it had considered not reemploying him but had received legal advice that Real Party in Interest's conduct did not then amount to a "persistent" refusal to comply with the reasonable rules of the District, so that termination of his employment as a probationary employee on those grounds would be of dubious legality; that he would therefore be reemployed for the 1973-1974 school year thereby achieving permanent status; that a continuation of his practice would be regarded as a persistent failure to abide by the rules of the District and as cause for dismissal; and that the letter itself also constituted a reprimand.

20. Despite the denial of his various requests and the receipt of the letter described in Finding 19, Real Party in Interest failed to appear for duty on the days listed in Finding 13.

21. Substitute teachers cannot adequately replace the regular classroom teacher in that it takes a period of time for the substitute teacher to become oriented to the pupils and their respective abilities, to deal with discipline problems, to execute lesson plans, and to accurately gauge past student progress for implementation of daily lessons.

22. The absences of the Real Party in Interest noted in Finding 13 and the attendant use of substitute teachers during those absences had a substantial detrimental effect on the educational program of the Ducor Union School District.

23. That the Real Party in Interest may not interpose nor offer the privilege of free exercise of religion under the United States and California Constitutions as an excuse or authority for his absences from his teaching duties with the Ducor Union School District.

CONCLUSIONS OF LAW

1. Respondents failed to proceed in the manner required by law and committed prejudicial abuse of discretion within the meaning of CCP Section 1094.5 in that Respondents refused to permit the amendment of the Accusation filed on June 27, 1975.

2. Respondents committed prejudicial abuse of discretion within the meaning of Code of Civil Procedure section 1094.5 in that Respondents' Findings XII, XIII, and XV of Respondents' Decision (attached hereto as Exhibit "A")[8] are not supported by the weight of the evidence nor are they in conformance with the law as found in this Court's Findings of Fact set forth hereinabove.

3. The Ducor Union School District had a compelling interest to keep the absences of regular permanent teachers on its staff to a minimum and was therefore justified in refusing to grant the Real Party in Interest, Mr. Byars, leave of absences for religious observances.

4. The Ducor Union School District has no duty to grant leaves of absence to the Real Party in Interest, Mr. Byars, from his teaching duties, imposed by contract and statute for religious observances.

[8]Counsel's comment: The Superior Court Judge refers to the decision by the Commission on Professional Competence included in this "Jurisdictional Statement" as Appendix "A".

5. Under the circumstances of this case and the facts found above, the actions of the Petitioners denying Real Party in Interest's requests for leave of absence for religious observances were lawful and did not violate the provisions of Amendments I and XIV to the Constitution of the United States and Section 4 of Article I of the Constitution of the State of California.

6. Real Party in Interest's conduct in failing to perform his duties as a certificated employee of the District on the dates set forth in Finding 13 was in violation of a lawful order and the reasonable rules and regulations of the Ducor Union School District and the school laws of the State of California and therefore constitutes a persistent violation of or refusal to obey the school laws of the State or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him.

7. Cause was established for the dismissal of Real Party in Interest from his position as a permanent certificated employee of the District under the provisions of Section 13403(g) of the Education Code.

8. Real Party in Interest, Thomas E. Byars, should be dismissed from his position as a permanent certificated employee of the Ducor Union School District.

9. Judgment shall be entered ordering a peremptory writ of mandamus to issue from this Court commanding Respondents to set aside their decision dated August 6,

1975 and to enter a decision in accordance with this Court's Findings of Fact and Conclusions of Law, and to take any further action specially enjoined upon them by law.

Dated: April 5, 1976

/s/ Jay R. Ballantyne
Superior Court Judge

APPENDIX D

Superior Court of the State of California
For the County of Tulare

Superior Court No. 80493

Warren Rankins, Superintendent-Principal of the Ducor Union School District, Joaquin Parson, Richard Owen, James Flynn, Frank Silva, and Lawrence Southard, Members of the Board of Trustees of the Ducor Union School District, and the Ducor Union School District,

Petitioners,

vs.

Commission on Professional Competence of the Ducor Union School District, and the Members thereof, Rudolf H. Michaels, Karyl (Cindi) Rubin and Clyde Simpson,

Respondents,

Thomas Edward Byars,

Real Party In Interest.

[Filed Apr. 5, 1976]

JUDGMENT GRANTING PEREMPTORY WRIT OF MANDAMUS

This matter came regularly before this court on November 26, 1975 for hearing. Thomas D. Bowman, Assistant County Counsel, appeared as attorney for Petitioners, William J. Power, Deputy Attorney General, appeared as

attorney for Respondent, and Paul Busacca, appeared as attorney for the Real Party in Interest. The record of the administrative proceedings having been received into evidence and examined by the court, the motion by the Petitioners to produce additional evidence having been heard and denied, no additional evidence having been received, arguments having been presented, the court having exercised its independent judgment and the court having made findings of fact and conclusions of law which have been signed and filed,

IT IS ORDERED that:

A peremptory writ of mandamus shall issue from this court, remanding the proceedings to Respondent and commanding Respondent to set aside its decision dated August 6, 1975, and to enter a decision in accordance with this court's findings of fact and conclusions of law, and to take any further action specially enjoined upon them by law.

Dated: April 5, 1976

/s/ Jay R. Ballantyne
Judge of Superior Court

Judgment entered on the 5th day of April, 1976, in the Judgment Book, Volume No. 174, page 402.

/s/ Mayme B. Gott
Deputy Clerk

APPENDIX E

Certified for Publication

In the Court of Appeal of the State of California

Fifth Appellate District

5 Civil No. 3010
(Sup. Ct. No. 80493) Tulare County

Warren Rankins, as Superintendent-Principal, etc., et al.,
Plaintiffs and Respondents,
vs.
Commission on Professional Competence of the Ducor Union School District, et al.,
Defendants and Appellants,
Thomas Edward Byars,
Real Party in Interest and Appellant.

[Filed Nov. 23, 1977]

OPINION

APPEAL from a judgment of the superior court. Jay R. Ballantyne, Judge. Affirmed.

Chain, Younger, Jameson, Lemucchi, Busacca & Williams, and Paul G. Busacca and Leonard Sacks for Real Party in Interest and Appellant.

Evelle J. Younger, Attorney General, and William J. Power, Deputy Attorney General, for Defendants and Appellants.

Calvin E. Baldwin, County Counsel, and Thomas D. Bowman, Assistant County Counsel, for Plaintiffs and Respondents.

• • • •

This is an appeal from a judgment granting a peremptory writ of mandamus directing the Commission on Professional Competence of the Ducor Union School District to set aside its decision (Ed. Code, § 13414),[1] and enter a decision dismissing Thomas Edward Byars from his position as a permanent certified (sic) employee of the Ducor District under Education Code section 13403 subdivision (g).[2]

The Ducor District, an elementary school district in Tulare County providing classes from kindergarten through seventh grade, acting through its Superintendent-Principal, Warren Rankins, and its Board of Trustees, filed an amended accusation on June 27, 1975, for the dismissal of Thomas E. Byars, a certificated employee, alleging persistent violation and refusal to obey the school laws and regulations of the state and district.

Byars filed a request for hearing pursuant to Education Code section 13412[3] and the matter was set for hearing before the Commission on Professional Competence, which rendered a two-to-one decision on August 6, 1975.

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[1]Now Education Code section 44945 (1976 Stats., Ch. 1010, amend. Ch. 1011, effective April 30, 1977).

[2]Now Education Code section 44932 subdivision (g).

[3]Now Education Code section 44943.

Respondent school district filed a petition for administrative mandamus in Tulare County Superior Court for review of the decision. The superior court ordered the issuance of a peremptory writ of mandate; and Byars and the commission appealed.

These are the facts:

Thomas E. Byars was hired by the Ducor Union School District as a classroom teacher on August 6, 1969. That contract and succeeding contracts specified that teacher Byars would "be required to render service in the above mentioned position for such length of time during the school year as the Governing Board of the School District may direct."

Mr. Byars converted to the faith of the Worldwide Church of God in 1971 and thereafter requested that he be given certain days off for holy days observed by members of that church. He was absent without permission on the following dates:

School Year	Dates of Absence
1971-1972	October 4, 5, 6, 7, 8 and 11, 1971, April 5, 1972 and May 22, 1972.
1972-1973	September 26, 27, 28 and 29, 1972, and April 23, 1973.
1973-1974	September 27; October 10, 11, 12, 15, 16, 17 and 18, 1973.
1974-1975	September 17, 26, 30; October 1, 2, 3, 4, 7 and 8, 1974 and April 2, 1975.

In March, 1973 the District informed Mr. Byars that it strongly disapproved of these absences and advised him that further absences for religious observances would be considered "a persistent failure to abide by the rules of the District" and a cause for dismissal.

Mr. Byars insisted that he had a constitutional right to be absent from the classroom on these days to exercise his adherence to the practices of the Worldwide Church of God.

In May 1975 the board unanimously voted to give Mr. Byars notice of intention to dismiss (Ed. Code, § 13403(g)) and followed the proper procedures for notice and dismissal as set out in the Education Code.[4] At the request of Mr. Byars, a hearing was set for July 24, 1975, before the Commission on Professional Competence.

The commission ruled on August 6, 1975 that the acts of the district were unlawful and violated the United States and California Constitutions. The commission found that none of Mr. Byars' absences had a substantial effect upon the school's operation.

On September 3, 1975, the district filed a petition for writ of mandate; after a hearing in the superior court on November 26, 1975, on the commission's transcript and on exhibits introduced, the court held in favor of the district and ordered Mr. Byars' dismissal, finding a compelling state interest in the district's concern in keeping absences of regular teachers to a minimum so as not to interrupt unduly the orderly educational progress of its students.

The Worldwide Church of God has some 50,000 members in the United States and observes as a high holy day each of the days on which Mr. Byars was absent; the members of the church must observe the sabbath and the holy days by absenting themselves from regular work. The sabbath extends from sundown on Friday to sundown on Saturday.

[4]Article 5, division 10, chapter 2, Education Code.

The district excused Mr. Byars from duties involving school activities on Friday evenings and for two high holy days in the 1971-72 term and in the 1972-73 term. The district continued the Friday evening accommodation for Mr. Byars, but thereafter refused his written requests for religious leaves of absence. The trial court found that he left his employment at the school without authorization for his observance of those holy days.

There is no doubt as to Mr. Byars' competence as a teacher. The trial court was convinced that substitute teachers could not supplant Mr. Byars on the staff without diminishing the educational benefit to the students even though Mr. Byars proposed study plans for substitute teachers to follow in his absence. It found that substitute teachers cannot adequately replace the regular classroom teacher in that it takes a period of time for the substitute teacher to become oriented to the pupils and to their respective abilities, to deal with discipline problems, to execute lesson plans, and to gauge accurately past student progress for implementation of daily lessons. The court also found that the absences of Byars and the use of substitute teachers for those absences had a substantial detrimental effect on the educational program of the Ducor Union School District.

The question on appeal is whether the respondents' termination of appellant's employment because of his refusal to work on his religious holidays is a violation of the free exercise clause of the First Amendment of the United States Constitution[5] as applied to the states through

[5]See also California Constitution article I, section 4.

the Fourteenth Amendment. We are not here concerned with the establishment clause of the First Amendment.

In *Reynolds v. United States* (1878) 98 U.S. 145, 166, the United States Supreme Court made its first pronouncement on the *free exercise clause* saying that although laws "cannot interfere with mere religious beliefs and opinions, they may with practices."

The court in 1940 held that not only may Congress make no law establishing religion or prohibiting the free exercise of religion, the "Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws." *Cantwell v. Connecticut* (1940) 310 U.S. 296, 303.) The court further said that the First Amendment "embraces two concepts,—freedoms to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." (Id. at pp. 303-304; see also Comment, (1976) *Religious Rights of Public School Teachers,* 23 UCLA L. Rev. 763, 767.)

While the free exercise clause prevents any governmental regulation of religious beliefs, in this case we are concerned not with Mr. Byars' beliefs but only with his practices in leaving his teaching duties for the purpose of religious observances while under contract with the district.

In 1963 in *Sherbert v. Verner,* 374 U.S. 398, 403, the Supreme Court held that some religious practices are protected from legislative restriction. (See Clark, *Guidelines for the Free Exercise Clause* (1969) 83 Harv. L.Rev. 327, 328-329.) In the *Sherbert* case, the court considered facts involving a member of the Seventh Day Adventist Church

who was discharged because she would not work on Saturday which was the sabbath according to her faith and who was thereafter denied unemployment benefits; the denial was affirmed in the South Carolina courts. In reversing, the court established a two-pronged test: (1) whether the state burdened the free exercise of her religion and, if so, (2) whether there was a compelling state interest justifying the imposition.

The trial court in the present case relied upon *Stimpel v. State Personnel Bd.* (1970) 6 Cal.App.3d 206.[6] It found the facts of that case were similar because Mr. Stimpel and Mr. Byars both refused to work on their religious days, making it necessary for the government employer to find substitutes to fulfill their contractual obligations. Stimpel, a Seventh Day Adventist, was employed by the state as a construction inspector, a job requiring that he inspect certain projects on site during the contractor's hours. He informed his superiors that he would not be available to work on Saturdays because of his religious beliefs. Even though he was told this would not be acceptable, he continued to work for two months, other inspectors taking his place on Saturdays. Eventually, his employment was terminated.

The court of appeal refused to reinstate Stimpel and distinguished the *Sherbert* case, *supra,* on the ground that Sherbert could only receive unemployment benefits from the state, whereas Stimpel was free to seek employment from one of "undoubtedly hundreds of other employers of construction inspectors within the state." (*Stimpel v. State*

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[6]Petition for hearing denied, California Supreme Court; certiorari denied, United States Supreme Court (400 U.S. 952.)

Personnel Bd., supra, 6 Cal.App.3d 206, 209.) The opinion ended with the following language:

> "The proliferation of religions with an infinite variety of tenets would, if the state is required as an employer to accommodate each employee's particular scruples, place an intolerable burden upon the state. We conclude that if a person has religious scruples which conflict with the requirements of a particular job with the state, he should not accept employment or, having accepted, he should not be heard to complain if he is discharged for failing to fulfill his duties."
> (6 Cal.App.3d at pp. 209-210.)

The trial court in the instant case found a compelling state interest in the orderly educational progress of the district's students. It also correctly noted in its memorandum decision that the case was controlled by the holding in the *Stimpel* opinion and, like *Stimpel,* it distinguished the present facts and problems from those confronted in *Sherbert v. Verner, supra,* 374 U.S. 398.

Appellants contend that the *Stimpel* case is both "legally unsound and factually distinguishable from the case at bar." However, in *Hildebrand v. Unemployment Ins. Appeals Bd.* (1977) 19 Cal.3d 765, the California Supreme Court approved the *Stimpel* reasoning.

In the *Hildebrand* case the defendant, the Unemployment Insurance Appeals Board, denied plaintiff Hildebrand's application for unemployment benefits on the ground that she left her last employment "voluntarily without good cause" within the meaning of section 1256 of the Unemployment Insurance Code. In 1970 plaintiff had become a member of the Worldwide Church of God and thereafter

recognized Saturday as a sabbath day; she discussed her religious beliefs with her employer and was excused from working on Saturdays during the 1970 and 1971 seasons. Before the 1972 season the employer advised her that she and all other employees would be required to work on Saturday, and she worked each Saturday of the 1972 season. At the beginning of the 1973 season the employer notified employees that it was necessary they work six days a week and occasionally even on Sundays and holidays. Plaintiff said she could not work on Saturdays and was told she would not be excused. When she failed to report for work she was replaced. After an administrative hearing, the referee found that plaintiff had left voluntarily without good cause, and that she had accepted employment in 1972 and 1973 knowing that she was required to work six days and perhaps seven days a week. The trial court reversed the holding of the referee on the basis of *Sherbert v. Verner, supra,* 374 U.S. 398.

However, the California Supreme Court distinguished the *Sherbert* case, saying that plaintiff Hildebrand, having initially accepted employment, thereafter left work voluntarily without good cause. The court said that the public policy underlying section 1256 of the Unemployment Insurance Code had been recognized statutorily and judicially by denying unemployment benefits to one who has voluntarily terminated employment without good cause, noting that the state promotes a valid purpose in assuring that unemployment benefits are reserved for persons unemployed through no fault of their own, and reducing involuntary unemployment and the suffering caused thereby to a minimum.

The court in *Hildebrand,* cited the *Stimpel* case, *supra,* (6 Cal.App.3d 206, 209-210), pointing out that the issue in *Stimpel* was the propriety of the absence from work of a state civil service employee because of religious scruples against Saturday employment and that the appellate court there said, "'[I]f a person has religious scruples which conflict with the requirements of a particular job . . . he should not accept employment or, having accepted, he should not be heard to complain if he is discharged for failing to fulfill his duties.'" (*Hildebrand, supra,* at p. 771.)

Mr. Byars had entered into a contract with the district under terms made clear to him from the beginning of his employment. Thereafter, it was his choice to absent himself from the classroom for religious purposes without permission from his employer. The district concluded it could not excuse Mr. Byars' absences in its efforts to maintain a proper educational program. We find this concern to be a compelling state interest. The court found that the free exercise clause of the United States and California Constitutions did not protect his conduct in absenting himself from his teaching duties.

The trial judge correctly relied upon present California law.

The judgment is affirmed.

Hanson (P.D.) J.*

WE CONCUR:

Brown (Geo. A.), P.J.

Gargano, J.

*Assigned by the Chairman of the Judicial Council.

APPENDIX F

In the Supreme Court of the State of California

S.F. 23769

Super. Ct. No. 80493

Warren Rankins, as Superintendent-Principal, etc. et al.,

Plaintiffs and Respondents,

vs.

Commission on Professional Competence of the Ducor Union School District et al.,

Defendants and Appellants;

Thomas Edward Byars,

Real Party in Interest and Appellant.

[Filed Apr. 30, 1979]

We inquire in this case whether as a condition of employment a school district may require a teacher to forego adherence to bona fide religious tenets that require several absences a year for observance of a church's holy days. We have concluded that under the circumstances presented such a condition of employment violates article I, section 8, of the California Constitution, which provides: "A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, *creed,* color, or national or ethnic origin." (Italics added.)

Thomas Byars was hired by Ducor Union School District in 1969 as an elementary classroom teacher under a contract requiring him "to render service . . . for such length of time during the school year as the Governing Board of the School District may direct." In 1971 he joined the Worldwide Church of God, which requires its members to refrain from all work on its weekly Sabbath (sundown Friday to sundown Saturday) and on certain holy days. To accommodate for those observances the district excused Byars from all Friday evening and Saturday activities and permitted him to be absent on two holy days in 1971-1972 and again in 1972-1973. His requests for permission to be absent on other holy days, always submitted well in advance, were denied. Accordingly, he was absent without permission for eight days in 1971-1972, five in 1972-1973, eight in 1973-1974, and ten in 1974-1975. Most of those days were consecutive. On each day of absence his class was taught by a substitute teacher for whom he had prepared a detailed lesson plan. The same substitute was employed for most absences in each school year.

Byars' religious sincerity and his competence as a teacher are unquestioned. The compensation of substitutes apparently was deducted from his salary (Ed. Code, former § 13467, now § 44977).

In March 1973 the district sent him a letter of reprimand, stating its disapproval of the unexcused absences and warning that their continuation would justify his dismissal. By the same letter, however, the district rehired him for 1973-1974 and made him a permanent instead of a probationary employee.

In May 1975 the district notified him of its intent to dismiss him for "[p]ersistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools" (Ed. Code, former § 13403, subd. (g), now § 44932, subd. (g)), basing its charges solely on the absences. At his request a hearing was held on July 24, 1975, before a commission on professional competence (Ed. Code, former § 13413, subd. (b), now § 44944, subd. (b); see Pasadena Unified Sch. Dist. v. Commission on Professional Competence (1977) 20 Cal.3d 309, 311 fn. 1).

The district superintendent testified that a substitute cannot equal a good regular teacher because the substitute takes time to become acquainted with the pupils' abilities and discipline problems, and may not be able to execute the lesson plan properly or acquire enough information to provide continuity of instruction. There was no other evidence of detriment caused by Byars' absences.[1] He introduced evidence that members of his church employed as teachers by five nearby school districts in Kern County were allowed to observe the holy days without hindrance or threat of discharge.

The commission found that none of his absences had a substantially detrimental effect on the educational program and that the district's denial of his requests for permission to be absent, together with its threats of discharge

[1]Byars' objection was sustained to questions about the superintendent's observations of Byars' classes while substitutes were in charge. The presiding officer indicated apprehension that admission of the testimony would open up collateral issues of the substitutes' competence and unduly prolong the hearing. (See Evid. Code, § 352.)

for such absences, interfered with his free exercise of religion. The commission concluded that this interference violated the Fourteenth Amendment of the United States Constitution and article I, section 4, of the California Constitution[2] and, therefore that he had not failed to obey a valid school law or regulation.

The district, its superintendent, and its board then brought the present mandate proceeding attacking the commission's order. (Ed. Code, former § 13414, now § 44945.) The trial court ruled that discharge of Byars was proper on the record before the commission.[3] The court found that his replacement by substitute teachers during his absences had a "substantial detrimental effect" that justified the district's discharging him notwithstanding the constitutional provisions cited by the commission. Accordingly the court ordered issuance of a writ of mandate; Byars appeals.

Would Byars' dismissal for absences required by his religious faith cause him to be "disqualified from . . . pursuing . . . [an] employment because of . . . creed" in violation of article I, section 8 of the California Constitu-

[2]Article I, section 4, states in part: "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion."

[3]The court refused the district's request to present testimony that the commission had excluded concerning the substitute teachers' performance in Byars classroom (see fn. 1 *ante*).

At the administrative hearing the commission had also refused to receive proof of two of Byars unexcused absences in 1973-1974 and two in 1974-1975. The court ruled that those absences should be considered even though they had been omitted from the notice of charges originally served on Byars.

tion? The stated reason for dismissal was not his religion but his nonattendance at school in accordance with district rules. Section 8, however, forbids not only overt religious discrimination but also qualifications for employment that are discriminatory in effect. (See Wisconsin v. Yoder (1972) 406 U.S. 205, 220; Griggs v. Duke Power Co. (1971) 401 U.S. 424, 431.) Though the district's rules are religiously neutral on their face, their effect was to exclude Byars from his employment because of his adherence to the precepts of his church. (See Sherbert v. Verner (1963) 374 U.S. 398, 403-404.) Unless that adherence created "an inability to perform the tasks required by a particular occupation," reliance on it for dismissal amounted to disqualification because of religion. (See Sail'er Inn, Inc. v. Kirby (1971) 5 Cal.3d 1, 9.)[4]

No published court opinion seems to have construed article I, section 8's prohibition of religious discrimination. Lines between (1) religiously proscribed tasks that the employment may lawfully require, and (2) tasks whose requirement by the employer would constitute unlawful religious discrimination have most frequently been drawn under the federal Civil Rights Act of 1964. Section 703(a)(1) of the act makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of

[4]*Sail'er Inn* construed former article XX, section 18, which prohibited disqualification from employment because of sex in language that was broadened in article I, section 8, adopted in 1974, to include prohibition of other forms of discrimination. Former article XX, section 18, was in the original Constitution of 1879 (see Matter of Maguire (1881) 57 Cal. 604) and was reworded without substantial change in 1970 (*Sail'er Inn*, 5 Cal.3d at p. 8, fn. 5).

employment, because of such individual's race, color, religion, sex, or national origin" (42 U.S.C. § 2000e-2(a)(1)).[5] To implement that section the Equal Employment Opportunities Commission in 1967 issued guidelines declaring that the duty not to discriminate on religious grounds includes an obligation to make reasonable accommodation to employees' religious needs insofar as possible without undue hardship on the employer's business. (29 C.F.R. § 1605.1.)[6]

[5]Direct applicability of the Civil Rights Act to this case need not be considered as Byars is not pursuing the act's remedies. (United Airlines v. Evans (1977) 431 U.S. 553, 558.) The act does not interfere with enforcement of state anti-discrimination laws. (42 U.S.C. §§ 2000e-7, 2000h-4.)

[6]The guidelines, still in effect, state:

"(a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, do not work on such days.

"(b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

"(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

"(d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people."

The guidelines were incorporated into a 1972 amendment of the act (42 U.S.C. § 2000e(j)),[7] and five years later the Supreme Court upheld them as a "defensible construction of the pre-1972 statute" (Trans World Airlines, Inc. v. Hardison (1977) 432 U.S. 63, 76, fn. 11). Earlier decisions in three federal circuits approved the guidelines' requirement of reasonable accommodation without undue hardship as a proper application of the principle (declared in Griggs v. Duke Power Co., *supra,* 401 U.S. 424, 431) that discrimination may be established by showing the disproportionate impact of an employment practice not justified by "business necessity."[8] (Yott v. North American Rockwell Corp. (9th Cir. 1974) 501 F.2d 398, 402-403; Riley v. Bendix Corp. (5th Cir. 1972) 464 F.2d 1113, 1115-1117; Draper v. United States Pipe & Foundry Co. (6th Cir. 1975) 527 F.2d 515, 517 fn. 1; Reid v. Memphis Publishing Co. (6th Cir. 1972) 468 F.2d 346, 350; but see contrary Sixth Circuit cases: Dewey v. Reynolds Metal Co. (1970) 429 F.2d 324, 329-330, affd. by equally divided court, 402 U.S. 689; Reid v. Memphis Publishing Co. (1975) 521 F.2d 512, 519, hg. en banc den., 525 F.2d 986.)

Relying on those decisions the Alaska Supreme Court recently construed its state statute forbidding religious

[7]The amendment defines "religion" as including "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." (42 U.S.C. § 2000e(j).)

[8]"The [Civil Rights] Act [of 1964] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." (*Griggs,* 401 U.S. at p. 431.)

discrimination as implying a similar duty of reasonable accommodation. (Wondzell v. Alaska Wood Products, Inc. (1978) 583 P.2d 860, 864; cf. Olin v. Fair Employment Practices Comm'n (1977) 67 Ill.2d 466, 474-475, 367 N.E.2d 1267, 1270-1271 (leaving question open under Illinois statute).) We think that duty also is implied by California's constitutional prohibition of religious disqualification from employment (art. I, § 8). Californians adopted the prohibition in 1974, and it expresses the same deep concern for religious freedom that underlies the First Amendment (see, e.g., Wisconsin v. Yoder, *supra*, 406 U.S. 205, 220-221). Just as that historic amendment protects religious practices from interference in the absence of a compelling state interest (People v. Woody (1964) 61 Cal.2d 716), article I, section 8 forbids disqualification of employees for religious practices unless reasonable accommodation by the employer is impossible without undue hardship.

The record here shows that by seeking to dismiss Byars the district failed to make reasonable accommodation to his desire to observe his church's holy days. The district's contention that its efforts to accommodate were as extensive as those found sufficient in Trans World Airlines, Inc. v. Hardison, *supra*, 432 U.S. 63 does not stand scrutiny. Hardison, an aircraft maintenance stores clerk who did work that had to be performed at all hours of every day, also joined the Worldwide Church of God to which Byars belongs. The employer accommodated Hardison's observance of holy days but found (1) that no qualified employee was willing to fill Hardison's job on his Saturday Sabbath, and (2) that involuntary assignment of a replacement was forbidden by the seniority provisions of the collective bargaining contract. The court held that the employer's duty of reasonable accommodation did not require it to violate the contract, to pay overtime wages to a substitute, or to get along with one less Saturday employee.[9] The district here, however, could adjust to Byars' absences without comparable burden. There was no shortage of fully qualified substitute teachers who could be and were called in to replace him at no additional cost to the district.

Accordingly the merits of the district's claim of undue hardship must turn on whether substantial evidence supports the trial court's finding, contrary to that of the commission, that Byars' absences and his replacement by substitutes had a substantial detrimental effect on the educational program of the district. (See Pasadena Unified Sch. Dist. v. Commission on Professional Competence, *supra*, 20 Cal.3d 309, 314.) The finding here is not thus supported. Though there is evidence that instruction by a regular teacher is generally preferable to instruction by a substitute, such evidence falls short of showing that Byars' absence for five to ten holy days a year imposed a hardship sufficiently severe to warrant disqualifying him from employment as a teacher. By statute each teacher is allowed at least 10 days of paid leave each year for illness or "personal necessity." (Ed. Code, §§ 44978, 44981.) A district unwilling to pay for leave for religious purposes as a personal necessity must then accommodate those purposes by allowing a reasonable amount of unpaid leave. (See California

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[9]The conclusion that accommodation conflicting with the seniority agreement was not required was held supported by a provision of the act that application of "a bona fide seniority or merit system" is not a violation if not the result of intentional discrimination. (*Hardison*, 432 U.S. at pp. 81-82, quoting 42 U.S.C. § 2000e-2(h).)

Teachers Assn. v. Board of Trustees (1977) 70 Cal.App.3d 431, 442.) The unpaid leave required for Byars' religious observances would not be unreasonably burdensome. The superintendent's objections to the use of substitute teachers were essentially that it takes time for the substitute to establish an effective relationship with the class and that lesson plans do not furnish the substitute with enough information. The fact that most classes missed by Byars were on consecutive days and taught by the same substitute provided more continuous time for the substitute's orientation than if Byars' absences had been sporadic. The fact that Byars knew the dates of his absences well in advance enabled him to furnish detailed lesson plans the quality of which is not disputed. Finally, the uncontradicted evidence that teachers in nearby school districts were permitted the absences denied Byars reinforces our conclusion that as a matter of law the district, by seeking to dismiss him, failed to make reasonable accommodation for his religious practices.

The district argues that our conclusion conflicts with Hildebrand v. Unemployment Ins. Appeals Bd. (1977) 19 Cal.3d 765. There the plaintiff, also a member of the Worldwide Church of God, was discharged in 1973 from her employment in a vegetable packing plant for declining on religious grounds to continue to work Saturdays and then was denied unemployment insurance benefits for having "left [her] most recent work voluntarily without good cause" (Unemp. Ins. Code, § 1256). A subsequently enacted section exempts, from that ground for denial, an employee deprived of employment because of religious creed unless the deprivation is "based upon a bona fide occupational

qualification." (Unemp. Ins. Code, § 1256.2.) This court construed the combined sections as precluding benefits to one who voluntarily accepts work under conditions known to conflict with her or his religion and then leaves the job because the conditions seem unacceptable. (*Hildebrand*, 19 Cal.3d at p. 772.) The court said that it was "certainly arguable" that the requirement of Saturday work was a bona fide occupational qualification in view of the employer's announcement at the beginning of the season that all employees would have to work every Monday through Saturday (and sometimes on Sunday) because of uncertain harvesting conditions and the perishable nature of the crop being packed. On the basis of Trans World Airlines, Inc. v. Hardison, *supra*, 432 U.S. 63, it was further suggested that, if the Civil Rights Act of 1964 were applicable, the Saturday work requirement would be consistent with the employer's duty under that act to accommodate for employees' religious observances. *Hildebrand* clearly is distinguishable. Byars at no time voluntarily accepted working conditions conflicting with his religion but, from the time he joined his church, refused to work on any holy day. He then was subjected to dismissal proceedings even though the district could reasonably have accommodated for his absences. Further, in *Hildebrand* the court construed only sections 1256 and 1256.2 of the Unemployment Insurance Code and did not consider article I, section 8 of the California Constitution.

Stimpel v. State Personnel Bd. (1970) 6 Cal.App.3d 206, cert. den. 400 U.S. 952, also relied on by the district, predates adoption of article I, section 8 and cannot be reconciled with the duty of accommodation to employees'

religious practices imposed by that section. Stimpel, a Seventh Day Adventist, was employed by the State of California as a construction inspector and for almost 18 months performed his duties without working on his Saturday Sabbath. He then was assigned to a project that he was told would require him to make inspections on Saturdays. His employment was terminated for unexcused absences; and he sought reinstatement (Gov. Code, § 19503), contending that " 'in the absence of substantial evidence establishing the extent of the burden upon the state agency to adjust its schedule to fit [his] religious beliefs and practices,' his 'freedom of religion has been restricted by state action which does not meet the constitutional tests of necessity' " (*Stimpel*, 6 Cal.App.3d at p. 609). Rejecting the contention, the Court of Appeal stated: "The proliferation of religions with an infinite variety of tenets would, if the state is required as an employer to accommodate each employee's particular scruples, place an intolerable burden upon the state. We conclude that if a person has religious scruples which conflict with the requirement of a particular job with the state, he should not accept employment or, having accepted, he should not be heard to complain if he is discharged for failing to fulfill his duties." (*Id.* at pp. 609-610.) That categorical rejection of any employer's duty to accommodate employees' religious practices conflicts with article I, section 8 and therefore does not correctly articulate present law.

The district contends that requiring it to accommodate Byars' religious observances contravenes the establishment clause of the First Amendment to the federal Constitution, which prohibits "law[s] respecting an establishment of

religion" and is made applicable to the states by the Fourteenth Amendment (Wolman v. Walter (1977) 433 U.S. 229, 232). The clause is not violated, however, by a law that (1) has a secular purpose, (2) has a primary effect that neither advances nor inhibits religion, and (3) avoids excessive governmental entanglement with religion. (Committee for Public Education v. Nyquist (1973) 413 U.S. 756, 772-773.) The district argues that ordering it to accommodate Byars' holy days has the purpose and primary effect of giving him preferential treatment because of his religion, thereby advancing the interests of his church.

The validity under the establishment clause of the imposition on employers by the Civil Rights Act of 1964 of a duty of reasonable accommodation to employees' religious practices (42 U.S.C. § 2000e(j)) has not been directly decided by the United States Supreme Court. (See Trans World Airlines v. Hardison, *supra*, 432 U.S. 63, 89-91 (Marshall, J. dis.); Cummins v. Parker Seal Co. (6th Cir 1975) 516 F.2d 544) (two-to-one decision upholding constitutionality), affd. by equally divided court, 429 U.S. 65; Wheeler, *Establishment Clause Neutrality and the Reasonable Accommodation Requirement* (1977) 4 Hastings Const. L.Q. 901, 915.) We think it clear that the purpose and the primary effect of imposing a similar duty of accommodation under article I, section 8 of the California Constitution are not to favor any religion but to promote equal employment opportunties for members of all religious faiths. The neutrality commanded by the establishment clause does not require the district to extend its accommodation for Byars' religious observances to other employees who seek time off for secular purposes. Without violating the establish-

ment clause, governments may lighten the burden consequent on religious practices through laws that are "secular in purpose, evenhanded in operation, and neutral in primary impact." (Gillette v. United States (1971) 401 U.S. 437, 450 (exemption of religious conscientious objectors from compulsory military service); see Walz v. Tav Commission (1970) 397 U.S. 664 (property tax exemption for churches).) Unlike the paid three-hours-off for state employees on Good Friday, found violative of the establishment clause in Mandel v. Hodges (1976) 54 Cal.App.3d 596, 610-615, the reasonable accommodation for Byars' religious observances required by article I, section 8 does not necessitate expenditure of money or preference of one religion over another. On the contrary, the effect of the accommodation is simply to lessen the discrepancy between the conditions imposed on Byars' religious observances and those enjoyed, say, for observances by adherents of majority religions as a result of the five-day week and the Christmas and Easter vacations of regular school calendars. Article I, section 8 does not require full equality of treatment of all employees' religious practices under all circumstances. It does require whatever reduction of inequality of treatment is possible through reasonable steps that do not impose undue hardship on employers.

The judgment is reversed with directions to deny the writ.

Newman, J.

WE CONCUR:
Bird, C. J.
Tobriner, J.
Mosk, J.

DISSENTING OPINION BY CLARK, J.

I dissent.

However the majority rationalize the factual record in this case, it remains clear that Thomas Byars was absent without permission from five to ten school days in each of the four school years immediately preceding his dismissal as a public school teacher. Byars was advised on numerous occasions that his contemplated absences on normal school days would not be excused, yet he deemed he had a superior, unilateral right to not perform duties he had contracted with the school district to perform. No one would challenge the propriety of Byars' discharge on these facts, absent his claimed constitutional right to exercise his religious beliefs.[1]

The majority hold that Byars' dismissal based on absences due to his religious practices caused him to be "disqualified from . . . pursuing . . . [an] employment because of . . . creed" (see Cal.Const., art. I, § 8). (*Ante,* p. F-4.) The majority curiously arrive at such conclusion on an analysis of cases arising out of the Civil Rights Act of 1964 notwithstanding the fact that Byars is *not* pursuing

[1]Although the majority rely on administrative findings to discount the impact of Byars' absences on the district's educational program (*ante,* p. F-3), the trial court—whose judgment is the subject of this appeal—expressly found that Byars' absences and the use of substitute teachers had a substantial detrimental effect on the educational program as it affected concerned students. The majority thus assume the role of factfinder and, contrary to trial court findings, conclude that because each teacher is allowed at least 10 days of paid leave each year for illness or personal necessity, a school district must allow an additional 5 to 10 days a year of unpaid leave for religious purposes since such amount of unpaid leave would not be "unreasonably burdensome." (*Ante,* p. F-4.) At what point the total of a teacher's absence in a given school year becomes "unreasonably burdensome" is surely a matter for the trier of fact and not for the reviewing court.

any remedy under that act. The net result of such analysis appears to be that an employer is required to make "reasonable accommodation" (*ante*, p. F-8) of an employee's religious practices. The California constitutional prohibition against disqualification from employment because of creed, according to the majority, should be similarly construed to reasonably accommodate an employee's religious practices. "Just as the First Amendment protects religious practices from interference in the absence of a compelling state interest . . . article I, section 8 forbids disqualification of employees for religious practices unless reasonable accommodation by the employer is impossible without undue hardship." (*Ante*, p. F-8.)

The majority seriously err in treating the issue as if we deal with a law compelling employers to accommodate employees in their religious practices. We deal with no such compulsion, either statutory or constitutional. The consitutional provision relied upon by the majority deals with disqualification from entering or pursuing a profession because of "creed." The ecclesiastical meaning of "creed" is "A brief, authoritative doctrinal formula, beginning with such words as 'Credo,' 'Credimus,' 'I believe,' 'We believe,' intended to define at certain points what is held by a congregation, a synod, or a church to be true and essential, and exclude what is held to be false belief . . . ." (Websters New Internat. Dict. (2d ed. unabridged) p. 622.)[2] Thus article I, section 8 in clear language is a

[2]Another meaning of "creed" is "Any formula or confession of religious faith; a system of religious belief, esp. as expressed or expressible in a definitive statement; sometimes a summary of principles or set of opinions professed or adhered to in science or politics, or the like . . . ." (*Id.*)

prohibition against disqualification from entering a profession solely on the basis of *beliefs* and does not purport to afford an employee, as the majority would hold, any right to be accommodated in the *practice* of his beliefs. The district has *not* disqualified Byars from entering or pursuing the teaching profession because of his "creed." There is no requirement in the constitutional provision that it must reasonably or otherwise accommodate Byars in practicing his creed regardless of the lack of undue or other hardship the district may suffer by such accommodation. The right Byars asserts must be established, if at all, by considerations not dependent on article I, section 8.

The question presented is whether Byars' termination of employment constitutes a violation of the free exercise clause of the First Amendment to the federal Constitution or of article I, section 4 of the California Constitution.[3] It was early established that while laws "cannot interfere with mere religious belief and opinions, they may with practices." (Reynolds v. United States (1878) 98 U.S. 145, 166; see also Cantwell v. Connecticut (1940) 310 U.S. 296, 303-304.) In speaking for a majority of this court in Gospel Army v. City of Los Angeles (1945) 27 Cal.2d 232, 242, Justice Traynor stated: "Religious liberty embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." In 1963 the Supreme Court ruled that where it is claimed a state has infringed the free exercise clause, it must be established that not only has the exercise of

[3]Article I, section 4, provides in pertinent part: "Free exercise and enjoyment of religion without discrimination of preference are guaranteed."

religion been burdened, but that there is also no compelling state interest justifying the burden. (Sherbert v. Verner (1963) 374 U.S. 398, 403.)

In Stimpel v. State Personnel Board (1970) 6 Cal.App. 3d 206 (cert.den., 400 U.S. 952), the employment of a state inspector was terminated because he declined to perform services, as required by his employment, on his Sabbath. In holding that the free exercise clause had not been offended because other employment within his profession was available to the plaintiff, the court stated: "The proliferation of religions with an infinite variety of tenets would, if the state is required as an employer to accommodate each employee's particular scruples, place an intolerable burden upon the state. We conclude that if a person has religious scruples which conflict with the requirements of a particular job with the state, he should not accept employment or, having accepted, he should not be heard to complain if he is discharged for failing to fulfill his duties." (*Id.*, at pp. 209-210.)

This court has approved the foregoing quoted language. In Hildebrand v. Unemployment Ins. Appeals Bd. (1977) 19 Cal.3d 765, unemployment benefits were denied an employee who—after accepting employment—became a member of the Worldwide Church of God and, like Byars, refused to work on the holy days of that church. When her employment was terminated she sought unemployment insurance benefits. A majority of this court held plaintiff had left work voluntarily without good cause. In principle, *Hildebrand* is indistinguishable from the present case. Each employee became a member of the Worldwide Church of God *after* accepting employment, each thereafter refused

to perform services on normal work days declared to be holy days by the church, each was warned that continued adherence to the practice would result in termination of employment, and the employment of each was eventually terminated for that reason.[4] These circumstances were deemed decisive in *Hildebrand* and, in factually distinguishing Sherbert v. Verner, *supra*, 374 U.S. 398, relied on by today's majority, the court stated: "In the matter before us, the condition was knowingly and voluntarily accepted, work commenced, and a change of heart thereafter ensued, doubtless motivated by the very deepest and most sincere of impulses." (Hildebrand v. Unemployment Ins. Appeals Bd., *supra,* 19 Cal.3d 765, 770-771.)

If Byars' exercise of religion is burdened by conditions of his employment, that burden is justified by the interest —in fact, the duty—of the district in maintaining a proper educational program to the end of insuring the reading, writing and other skills of students exposed to the program. No legitimate claim can be made that the interest in accomplishing such an objective is not a compelling state interest (cf. Sherbert v. Verner, *supra,* 374 U.S. 398, 403) and, as stated, we must give effect to the trial court finding

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[4]The majority attempt to distinguish *Hildebrand* on the ground that "Byars at no time voluntarily accepted working conditions conflicting with his religion . . . ." (*Ante*, p. F-11.) However, the majority further acknowledge that Byars was hired by the district in 1969 "to render services . . . for such length of time during the school year as the Governing Board of the School District may direct." (*Ante*, p. F-2.) Byars accepted all work assignments until the 1971-1972 school year.

that Byars' absences had a substantial detrimental effect on that program.

It seems clear for the foregoing reasons that the termination of Byars' employment is not impermissible under the free exercise clause of either the First Amendment of the federal Constitution or article I, section 4 of the California Constitution.

I am further at a loss to understand how the majority decision in this case is philosophically consistent with that in Fox v. City of Los Angeles (1978) 22 Cal.3d 792. In that case the majority held that the city could not light its windows in a manner to form a Christian cross, as to do so constituted a constitutionally impermissible state involvement with religion. (See Fox v. City of Los Angeles, *supra,* 22 Cal.3d 792, dis. opn. of Richardson, J. at p. 817.) The majority stated there that "governments must commit themselves to 'a position of neutrality' whenver 'the relationship between man and religion' is affected (*id.,* at p. 798), and that we must guard "against every governmental intrusion, large or small, into the inner sanctum of conscience" (*id.,* conc.opn. of Bird, C.J., at p. 813). Now the majority hold that the state must not be neutral but must get involved with matters of conscience by making accommodations to those who wish to practice their religions at times they have contracted to perform services for the state—an involvement of much greater substance than that of *Fox.* I am aware that the majority will attempt to explain their divergent positions on the ground that the establishment of a religion was at issue in *Fox,* while it is

the free exercise of religion which is at issue here. In actuality, however, the exercise of religion mandated by the majority today constitutes a law respecting an establishment of Mr. Byars' religion, rendering the state no longer neutral in the relationship between man and his religion.

I would affirm the judgment.

Clark, J.

WE CONCUR:
Richardson, J.
Manuel, J.

APPENDIX G

ORDER DUE
May 30, 1979

ORDER DENYING REHEARING

S.F. No. 23769

In the Supreme Court of the State of California
In Bank

Rankins, as Superintendent-Principal, Etc., Et Al.,
Plaintiffs and Respondents

v.

Commission on Professional Competence
of the Ducor Union School District,
Defendants and Appellants;
Byars
Real Party in Interest and Appellant.

[Filed May 30, 1979]

Petition of plaintiffs and respondents for rehearing DENIED.

Clark, J., and Richardson, J., are of the opinion that the petition should be granted.

Bird
Chief Justice

APPENDIX H

In the Supreme Court of the State of California

SF No. 23769

Warren Rankins, Superintendent-Principal of the Ducor Union School District, Joaquin Parsons, Richard Owen, James Flynn, Frank Silva, and Lawrence Southard, Members of the Board of Trustees of the Ducor Union School District, and the Ducor Union School District,

Plaintiffs and Appellants,

vs.

Commission on Professional Competence of the Ducor Union School District, and the Members thereof, Rudolf H. Michaels, Karyl (Cindi) Rubin and Clyde Simpson,

Defendants and Appellees,

Thomas Edward Byars,

Real Party in Interest and Appellee.

[Filed July 25, 1979]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN WARREN RANKINS, etc., et al., the Plaintiffs and Appellants above-named, hereby appeals to the Supreme Court of the United States of America from the final judgment of the Supreme Court

of the State of California, reversing the judgment of the Tulare County Superior Court entered in this action on May 30, 1979.

This appeal is taken pursuant to United States Code, Title 18, Section 1257(2).

Dated: July 23, 1979.

CALVIN E. BALDWIN
County Counsel

By THOMAS D. BOWMAN
Thomas D. Bowman
Assistant County Counsel

In the Supreme Court of the State of California

SF No. 23769

Warren Rankins, et al.,
Appellants,
vs.
Commission on Professional Competence, etc., et al.,
Appellees,
Thomas Edward Byars,
Appellee.

AFFIDAVIT OF SERVICE

I, Thomas D. Bowman, being first duly sworn, depose and say:

That I am a citizen of the United States over twenty-one years of age and not a party to this cause.

That on July 23, 1979, I served copies of the foregoing "Notice of Appeal to the United States Supreme Court" on the several parties thereto depositing true copies thereof enclosed in sealed envelopes, with first class postage thereon fully prepaid, in the United States Post Office mailbox at Visalia, California, addressed as follows:

Chain, Younger, Jameson,
Lemucci, Busacca & Williams
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Attorneys for Appellee
THOMAS E. BYARS

Department of Justice
Office of the Attorney General
555 Capitol Mall, Suite 350
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Attorneys for Appellees, COMMISSION
ON PROFESSIONAL COMPETENCE, etc., et al.

Leonard Sacks
Suite 1833
15910 Ventura Boulevard
Encino, CA 91436

Hon. Jay R. Ballantyne
Superior Court, Tulare County
Courthouse, Civic Center
Visalia, California 93277

All parties required to be served have been served.

Dated: July 23, 1979.

CALVIN E. BALDWIN
County Counsel
By THOMAS D. BOWMAN
Thomas D. Bowman
Assistant County Counsel

Subscribed and Sworn to before me this 23rd day of July, 1979

(Seal)

Ronald L. Stiffler
Notary Public, California
Notary Bond Filed in
Tulare County
My Commission Expires October 5, 1979

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-302

WARREN RANKINS, Superintendent-Principal of the Ducor Union School District, JOAQUIN PARSONS, RICHARD OWEN, JAMES FLYNN, FRANK SILVA, and LAWRENCE SOUTHARD, Members of the Board of Trustees of the Ducor Union School District, and the DUCOR UNION SCHOOL DISTRICT,

Appellants,

vs.

COMMISSION ON PROFESSIONAL COMPETENCE OF THE DUCOR UNION SCHOOL DISTRICT, and the Members thereof, RUDOLF H. MICHAELS, KARYL (CINDI) RUBIN, CLYDE SIMPSON and THOMAS EDWARD BYARS,

Appellees.

MOTION OF APPELLEE THOMAS EDWARD BYARS TO DISMISS OR AFFIRM

CHAIN, YOUNGER, JAMESON, LEMUCCHI, BUSACCA & WILLIAMS
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Thomas Edward Byars

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-302

WARREN RANKINS, Superintendent-Principal of the Ducor Union School District, JOAQUIN PARSONS, RICHARD OWEN, JAMES FLYNN, FRANK SILVA, and LAWRENCE SOUTHARD, Members of the Board of Trustees of the Ducor Union School District, and the DUCOR UNION SCHOOL DISTRICT,

Appellants,

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Attorneys for Appellee
Thomas Edward Byars

TOPICAL INDEX

TABLE OF AUTHORITIES

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1979
No. 79-302

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Appellants,

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Appellees.

MOTION OF APPELLEE
THOMAS EDWARD BYARS
TO DISMISS OR AFFIRM

To The Honorable Justices of the Supreme Court of the United States:

Pursuant to Rule 16, appellee Thomas Edward Byars hereby moves this Court to dismiss the purported appeal of appellants, or, in the alternative,

to affirm the judgment of the Supreme Court of the State of California, on the following grounds:

(a) The appeal should be dismissed on the grounds that it does not present a substantial federal question and

(b) The judgment sought to be reviewed by the appeal should be affirmed because the alleged federal question on which the decision of the cause depends is so insubstantial as not to merit further argument and because the judgment of the California Supreme Court was clearly correct.

QUESTIONS PRESENTED

It is our position that there is no bona fide federal question presented. The only substantial question presented in the case at bar is a question of interpretation of Article I, §8 of the California Constitution. That provision prohibits the disqualification of a person from entering or pursuing a profession or employment because of, among other things, creed.[1/] In the instant case the California Supreme Court interpreted the word "creed" to mean religious beliefs (see, e.g., pp. F-4 to F-6 of appellants' "Jurisdictional Statement"), and interpreted the constitutional

1/ The full text of Article I, §8 of the California Constitution is set out at page 4 of appellants' "Jurisdictional Statement."

provision to mean that discrimination in employment by reason of such religious beliefs is prohibited (id at pp. F-7 to F-8).[2/]

The only federal question appellants contend is presented is based upon the "establishment of religion" clause of the First Amendment of the United States Constitution. This is clearly an insubstantial contention. It was only urged by appellants in the proceedings below casually and as a "makeweight." Their main contention throughout was based upon the interpretation of the above provision of the California Constitution, and the California Courts so viewed the issues.[3/]

2/ Appendix F annexed to appellants' "Jurisdictional Statement" sets forth the opinion of the California Supreme Court from which appellants purport to appeal. That opinion is reported at 24 Cal. 3d 167, 154 Cal. Rptr. 907, and 593 P. 2d 852. For the convenience of the Court, we will herein cite to Appendix F of Appellants' "Jurisdictional Statement" when referring to the California Supreme Court opinion.

3/ Thus, while the California Supreme Court split 4-3 in this case, the dissenters did not even mention the "establishment" clause (see Dissenting Opinion at pp. F-15 to F-21 of Appendix to appellants' "Jurisdictional Statement"). The dissenters differed with the majority's interpretation of the California Constitution. The only clause of the United States Constitution referred to in the dissenting opinion is the "free exercise" clause of the First Amendment (see, e.g., Disenting Opinion at pp. F-17 and F-20).

(continued on p. 4)

The reason that there is no merit in the claim based on the "establishment" clause is succinctly set forth on the last two pages of the majority opinion of the California Supreme Court (pp. F-13 to F-14), which will be discussed further below (Point I, infra). And the practical effect of the ruling appellants seek from this Court would be not only to permit, but to compel, school districts to discharge all teachers who are conscientious practitioners of religions other than the majority Christian religions (Point I, infra). Such a result would have a catastrophic effect on all school districts in this country, which employ numerous teachers practicing minority religions.[4/] Additionally, this

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3/ (continued from previous page)

Similarly, the opinions of the California Court of Appeal and the California Superior Court (annexed to appellants' "Jurisdictional Statement" as Appendices "E" and "C," respectively) do not discuss the "establishment" clause. The California Court of Appeal opinion specifically states: "We are not here concerned with the establishment clause of the First Amendment." (p. E-6).

4/ It should be noted that many of the Holy Days of appellee Byars' religion are identical with the Holy Days of the Jewish religion. The Worldwide Church of God observes the same Sabbath as the Jewish religion (Clerk's Transcript 54; Exhibit B introduced at the hearing, pp. 11-21, 39-42). The Feast of Trumpets Holy Day of the Worldwide Church of God is the same as the Rosh Hashanah of the Jewish religion (ibid). The Day of Atonement Holy Day of the Worldwide Church of God

(continued on p. 5)

result would afford xenophobic and provincial school boards carte blanche to eliminate from their schools all adherents of religious beliefs antipathetic to the members of such school boards (see Point I, infra).

STATUTES INVOLVED

As indicated, Article I, §8 of the California Constitution is the only provision as to which any serious issue is presented, and that does not present any federal question. Appellants also contend that the "establishment clause" of the First Amendment of the United States Constitution is involved (appellants' "Jurisdictional Statement" at p. 4).

STATEMENT OF THE CASE

The "Statement of the Case" set forth by appellants (at pp. 4-6 of their "Jurisdictional Statement") may perhaps be true, but it is inexhaustive. A complete statement of the case is found in the opinion of the California Supreme Court

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4/ (continued from previous page)

is the same as the Yom Kippur of the Jewish religion, and so forth (ibid). The ruling appellants seek would clearly enable school districts to conduct a wholesale purging of teachers who are conscientious practitioners of the Jewish religion and, indeed, would compel such a result (see Point I, infra).

(pp. F-2 to F-4). As that opinion shows, Mr. Byars joined the Worldwide Church of God in 1971, and his religious sincerity subsequent to that time is unquestioned (p. F-2).[5/]

Thereafter, Mr. Byars requested permission to be absent (without pay) on his religion's Holy Days (opinion of the California Supreme Court at p. F-2). These requests were always submitted well in advance, and Mr. Byars prepared detailed lesson plans for his substitute to follow in his absence (ibid). The same substitute was employed for most absences in each school year (ibid).

The appellant school district sought to compel Mr. Byars to abandon his religion, as a price for continued employment, and demanded that he teach on those of his religion's Holy Days that were not religious Holy Days of the majority Christian

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5/ Appellants apparently believe it significant that Mr. Byars did not mention the Worldwide Church of God in his initial job interview in 1969, and that he made no requests for leaves of absences until the 1971-1972 school year (appellants' "Jurisdictional Statement" at pp. 4-5). Appellants thus appear to be insinuating that Mr. Byars' subsequent decision to adopt the Worldwide Church of God religion is somehow a pretext. However, no such claim has heretofore been asserted during the course of the four years this proceeding has thus far consumed, and, as shown in text, the factual findings establish that Mr. Byars' religious beliefs were sincere and constituted the sole motivation for seeking the leaves of absence at issue here.

religions (opinion of the California Supreme Court, pp. F-2 to F-3). When he refused to forsake the precepts of his religion, appellants sought to discharge him. (id at p. F-3).

Mr. Byars requested a hearing before the Commission on Professional Competence, the body designated by California law to rule on teacher rights disputes (opinion of the California Supreme Court at p. F-3). At the hearing before the Board, the only evidence introduced of detriment caused by Mr. Byars' absences was some cursory testimony of the district superintendent to the effect that a substitute cannot equal a good regular teacher (ibid). However, it was undisputed that other school districts in California allowed teachers to observe the Worldwide Church of God Holy Days without hindrance or threat of discharge (ibid), and that teachers were allowed 10 days' "personal necessity" leave (pp. F-9 and F-10).

Although appellants' "Jurisdictional Statement" professes zeal for the principle of separation of church and state, it is undisputed that they at all times accommodated the religious beliefs of adherents of the majority Christian religions. They scrupulously observed Christmas and Easter (opinion of the California Supreme Court at p. F-14), and the record is devoid of any attempt on the part of appellants to compel teachers to work during these periods or on Sundays.

The Commission for Professional Competence found for Mr. Byars and thereafter appellants appealed this decision to the California courts, with the result that four separate tribunals, comprising a total of eleven judges and three hearing officers, have now ruled on this matter.

As we have previously observed (FN 3, supra), not one member of any of these tribunals has ever mentioned or suggested, even remotely, that affording Mr. Byars the religious absences in controversy would violate the "establishment of religion" clause. Yet this insubstantial claim constitutes the sole ground of appellants' present purported appeal to this Court.

As we will now show, this purported appeal should be dismissed or, in the alternative, the judgment of the California Supreme Court should be affirmed.

ARGUMENT

I
THE APPEAL SHOULD BE DISMISSED

We believe the appeal should be dismissed because it does not present a substantial federal question. As shown above, the sole purported "federal question" presented is whether the "establishment of religion" clause is violated when teachers are permitted time off, without pay, to observe their religious beliefs. If such a practice could conceivably be found to violate the "establishment of religion" clause, two consequences would flow:

1. Any school district in the United States would be afforded an unlimited right to practice

rank religious discrimination, merely by adopting a policy of refusing leave for whatever religious holidays are observed by the religion it seeks to discriminate against; and

2. Perhaps even more ominously, all school districts in the United States would be compelled to refuse all religious absences, and hence the only persons who would be permitted to teach in the public schools in this country would be those who do not have any sincere religious beliefs.

Appellants' previous briefs demonstrate that their contention with respect to the "establishment of religion" clause would have the foregoing effects. They have argued that the "establishment of religion" clause forbids them from permitting absences for religious reasons. Thus, in their Brief filed in the California Court of Appeal (dated May 19, 1977), appellants stated as follows:

> "The other side of the coin is whether the Ducor Union School District Board of Trustees or Superintendent has the power to grant a leave of absence for religious purposes without violating the Establishment Clause of the First Amendment of the United States Constitution. . . . This clause is likewise applicable to political subdivisions of the State [citation]. Not only is the government barred from supporting an established church, it may not prefer any religion to another. [citations] In the present case, the Worldwide Church of God seeks

preferential treatment by asking that Mr. Byars be excused from his teaching duties to observe the sect's religious holidays."

Appellants' Brief to the California Court of Appeal at p. 16

Appellants then discussed the inapposite California case of Mandel v. Hodges, 54 Cal. App. 3d 596, 127 Cal. Rptr. 244 (1976) and continued:

"Applying these tests and following the Court in Mandel, we submit that the rule contended for by Mr. Byars would likewise violate the Establishment Clause. It can scarcely be said that such a rule would have a secular purpose. Such a leave-of-absence policy would advance the interests of the Worldwide Church of God. It would surely entangle the School District with religion.

"For these reasons, the Ducor Union School District submits that it could not grant the leave of absence without violating the Establishment Clause of the First Amendment of the United States Constitution."

Appellants' Brief to the California Court of Appeal at p. 17 (emphasis added) See also: Appellants' "Jurisdictional Statement" at pp. 7-8

Under the construction appellants urge this Court to adopt, then, no school district in the United States could grant a religious absence to any teacher. It is self-evident that such a ruling would have a catastrophic effect, not only on the literally tens of thousands of dedicated teachers of minority religions, but also on public education itself; our system of public education could not easily adjust to the massive discharge of teachers that would be compelled by the ruling appellants seek.

The vacuous and mischievous nature of appellants' contention that the establishment of religion clause permits, and even requires, them to discharge appellee Byars is thus manifest. The California Supreme Court succinctly answered said contention, as follows:

"We think it clear that the purpose and the primary effect of imposing a . . . duty of accommodation under article I, section 8 of the California Constitution are not to favor any religion but to promote equal employment opportunities for members of all religious faiths. The neutrality commanded by the establishment clause does not require the district to extend its accommodation for Byars' religious observances to other employees who seek time off for secular purposes. Without violating the establishment clause, governments may lighten the burden consequent on religious practices through laws that are 'secular in purpose, evenhanded in operation, and neutral in primary impact.' [citation] . . . the

reasonable accommodation for Byars' religious observances required by article I, section 8 does not necessitate expenditure of money or preference of one religion over another. On the contrary, the effect of the accommodation is simply to lessen the discrepancy between the conditions imposed on Byars' religious observances and those enjoyed, say, for observances by adherents of majority religions as a result of the five-day week and the Christmas and Easter vacations of regular school calendars. Article I, section 8 does not require full equality of treatment of all employees' religious practices under all circumstances. It does require whatever reduction of inequality of treatment is possible through reasonable steps that do not impose undue hardship on employers."

pp. F-13 and F-14
emphasis added

Appellants do not explain how their reliance on the "establishment of religion" clause can be reconciled with their accommodation of adherents of majority religions. Appellants certainly have never evinced any intention to abandon this accommodation; they simply seek to emasculate and destroy equal employment rights for conscientious adherents of minority religions which may have different Holy Days.

It is, of course, clear that the establishment of religion clause cannot be distorted in the fanciful manner sought by appellants. See, e.g.: Gillette v. United States, 401 U.S. 437, 449-459, 91 S.Ct. 828, 836 (exemption of conscientious objectors from military service); Walz v. Tax Commission, 397 U. S. 664, 673, 90 S.Ct. 1409, 1413 (property tax exemption for churches upheld; religious groups are considered "beneficial and stabilizing influences in community life"); McGowan v. State of Maryland, 366 U.S. 420, 81 S.Ct. 1101 (Sunday closing laws). The authority which is perhaps closest on its facts to the case at bar demonstrates that the "establishment" clause cannot be wielded to permit rank religious discrimination. Sherbert v. Verner, 374 U.S. 398, 409-410, 83 S.Ct. 1790, 1797 (appellant, a Seventh Day Adventist, was fired for refusing to work on Saturday, the Sabbath day of her faith. This Court held that unemployment insurance benefits could not be denied appellant because of her religious beliefs. With respect to the claim that the "establishment" clause precluded payment of benefits, this Court said that extension of such benefits "reflects nothing more than the governmental obligation of neutrality in the face of religious differences, . . . [the State] may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions" [emphasis added]).

It is therefore respectfully submitted that the instant appeal does not present a substantial federal question. The appeal should therefore be dismissed.

II
THE JUDGMENT SOUGHT TO BE REVIEWED SHOULD BE AFFIRMED.

We respectfully submit that the foregoing discussion demonstrates that the question on which the decision of the cause depends is so insubstantial as not to merit further argument. No authority has ever held that the widespread and prevalent practice of permitting teachers days off for religious holidays even remotely approaches the type of entanglement with religion that would invoke the "establishment" clause. (See Walz v. Tax Commission, supra, wherein this Court noted that "an unbroken practice . . . is not something to be lightly cast aside" [397 U.S. at p. 678, 90 S.Ct. at p. 1416]).

Moreover, and in any event, the judgment of the California Supreme Court was clearly correct. The prohibition of religious discrimination which is the underpinning of said decision, and of the clause in the California Constitution on which it is based, manifestly merits affirmance.

CONCLUSION

The appeal should be dismissed or, in the alternative, the judgment should be affirmed.

Respectfully submitted,

CHAIN, YOUNGER,
JAMESON, LEMUCCHI,
BUSACCA & WILLIAMS
PAUL G. BUSACCA

and

LEONARD SACKS

Attorneys for Appellee
Thomas Edward Byars